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1141  
No. 3103

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1141  
**United States Circuit Court  
of Appeals**  
**For the Ninth Circuit**

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PORTLAND CATTLE LOAN COMPANY, a corporation,

*Plaintiff in Error,*

*vs.*

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,

*Defendant in Error.*

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**TRANSCRIPT OF RECORD**

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On Writ of Error to the District Court of the  
United States for the District of Oregon.

**FILED**

**DEC 26 1917**

**F. D. MONCKTON,  
CLERK.**

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No. \_\_\_\_\_

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of Appeals**

**For the Ninth Circuit**

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*United States Circuit Court of Appeals for the  
Ninth Circuit.*

PORTLAND CATTLE LOAN COMPANY, a corporation,

*Plaintiff in Error,*

*vs.*

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,

*Defendant in Error.*

Names and addresses of Attorneys of Record:

CAREY AND KERR and

CHARLES A. HART,

Yeon Building,

Portland, Oregon,

Attorneys for Plaintiff in Error.

A. C. SPENCER and

W. A. ROBBINS,

Wells Fargo Building,

Portland, Oregon,

Attorneys for Defendant in Error.



*In the District Court of the United States for the  
District of Oregon.*

PORTLAND CATTLE LOAN COMPANY, a corporation,

*Plaintiff in Error,*

*vs.*

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,

*Defendant in Error.*

CITATION ON WRIT OF ERROR.

United States of America, District of Oregon, ss.  
To Oregon Short Line Railroad Company, a corporation,  
Greeting:

Whereas, Portland Cattle Loan Company has petitioned for, and an order has been made allowing a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in the District Court of the United States for the District of Oregon in your favor, and has given the security required by law;

You are therefore hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof to show cause, if any there be, why the errors complained of in said judgment should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said district this 9th day of November in the year nineteen hundred seventeen.

Chas. E. Wolverton,  
Judge.

Service accepted this 9th day of November, 1917.

W. A. Robbins,  
Of Attorneys for Plaintiff Oregon Short Line Railroad Company.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

Portland Cattle Loan Company, a corporation,  
Plaintiff in Error,

vs.

Oregon Short Line Railroad Company, a corporation,  
Defendant in Error.

### WRIT OF ERROR.

The United States of America, ss.

The President of the United States of America.  
To the Judge of the District Court of the United  
States for the District of Oregon,  
Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between Oregon Short Line Railroad Company, a corporation, plaintiff

and defendant in error, and Portland Cattle Loan Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White,  
Chief Justice of the Supreme Court of the United  
States this 9th day of November, 1917.

G. H. Marsh,  
Clerk of the District Court of the United States for  
the District of Oregon.

(Seal.)

By F. L. Buck,  
Deputy.



Endorsed: No. 7233.

In the U. S. Circuit Court of Appeals for the Ninth Circuit. Portland Cattle Loan Company, a corporation, Plaintiff in Error, vs. Oregon Short Line Railroad Company, a corporation, Defendant in Error. *Writ of Error*. Filed November 9, 1917. G. H. Marsh, Clerk United States District Court, District of Oregon. By F. L. Buck, Deputy Clerk.

---

In the District Court of the United States for the District of Oregon.

November Term, 1916.

Be it remembered that on the 2d day of November, 1916, there was duly filed in the District Court of the United States for the District of Oregon, an amended complaint in words and figures as follows, to-wit:

AMENDED COMPLAINT.

In the District Court of the United States in and for the District of Oregon.

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,  
Defendant.

Oregon Short Line Railroad Company, a corporation organized and existing under and by virtue of

the laws of the State of Utah, brings this, its complaint against Portland Cattle Loan Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, on a cause of action arising under the laws regulating commerce, and thereupon, complains and says:

I.

That plaintiff now is, and at all times herein-after mentioned was a corporation organized and existing under and by virtue of the laws of the State of Utah, doing business as a common carrier of freight and passengers in the States of Utah, Wyoming, Idaho and Montana, and at and through Pocatello, in the State of Idaho, and Butte, in the State of Montana, and was so engaged in interstate commerce, subject and amenable to the Acts to Regulate Commerce, commonly known as the "Interstate Commerce Act," approved February 4th, 1887, and acts amendatory thereof and supplementary thereto; and was at all of said times engaged in the transportation of freight for hire, as a common carrier, in connection with other common carriers, from points in the State of Texas, and elsewhere, to points in the State of Idaho, and to points in the State of Montana, and particularly from Hereford, in the State of Texas, to Nampa in the State of Idaho, and from Hereford in the State of Texas, to Butte in the State of Montana.

## II.

That the defendant, Portland Cattle Loan Company, now is and at all the times hereinafter mentioned was a corporation, organized and existing under and by virtue of the laws of the State of Oregon.

## III.

That on or about the 28th day of September, 1912, this defendant caused A. G. Greenameyer to deliver to the Panhandle & Santa Fe Railway Company, at Hereford, in the State of Texas, forty-four (44) carloads of cattle, for transportation by freight from Hereford, Texas, over the line of the said Panhandle & Santa Fe Railway Company, to Amarillo, Texas, and thence over the lines of connecting carriers, and over the line of the Oregon Short Line Railroad Company, plaintiff herein, to Nampa, Idaho, there to be delivered to the Portland Cattle Loan Company, defendant herein, the consignee; and the said railroads, as connecting carriers thereupon transported the said forty-four (44) carloads of cattle from Hereford, Texas, to Amarillo, Texas, where the said forty-four (44) cars were combined into forty-three (43) cars, and were thereupon transported over the lines of connecting carriers, and over the line of this plaintiff, to Pocatello, Idaho, at which place twenty-seven (27) of the said forty-three (43) carloads of cattle, upon the order of defendant, were delivered to Portland Cattle



Loan Company the defendant herein, by said Oregon Short Line Railroad Company, this plaintiff; and thereupon defendant ordered this plaintiff to divert and transport sixteen (16) of the said forty-three (43) carloads of cattle to Butte, in the State of Montana, and plaintiff thereupon transported the said sixteen (16) carloads of cattle to Butte, Montana, at which place the said sixteen (16) carloads of cattle were delivered to the Portland Cattle Loan Company, defendant herein, by this plaintiff.

#### IV.

That more than thirty days prior to the delivery of said freight to the carriers aforesaid, said carriers had duly filed with the Interstate Commerce Commission of the United States at Washington, D. C., and posted and published pursuant to the provisions of the Act to Regulate Commerce, approved February 4th, 1887, and the acts amendatory thereof and supplementary thereto, commonly known as the Interstate Commerce Act, tariffs showing and establishing the lawful charges to be made to all persons, as in said act provided, for the transportation of cattle in carload lots, by freight, between said stations of Hereford, Texas, and Pocatello, Idaho, and between said stations of Hereford, Texas, and Butte, Montana; that the lawful charges established by said tariffs on said carloads of cattle between Hereford, Texas, and Pocatello, Idaho, as aforesaid, amounted to the

sum of one hundred and forty-two and 90/100 dollars (\$142.90) per car, making a total sum of three thousand eight hundred fifty-eight and 30/100 dollars (\$3858.30); that the lawful charges established by said tariffs on said carloads of cattle between Hereford, Texas, and Butte, Montana, amounted to the sum of one hundred seventy-one and 20/100 dollars (\$171.20) per car, making a total sum of two thousand seven hundred thirty-nine and 20/100 dollars (\$2739.20); that the lawful charges established by said tariffs on said carloads of cattle between Hereford, Texas, and Amarillo, Texas, amounted to the sum of twenty-six and 40/100 dollars (\$26.40); and that the entire amount of the lawful charges due from the said defendant to the said plaintiff, as aforesaid, was sixty-six hundred and twenty-three and 90/100 dollars (\$6623.90); that no part thereof, except the sum of sixty-three hundred forty-two and 30/100 dollars (\$6342.30) has been paid, although payment thereof has been duly demanded of and refused by the defendant herein, and that plaintiff thereby undercharged defendant two hundred eighty-one and 60/100 dollars (\$281.60) on the said shipment as aforesaid.

V.

That after defendant had paid plaintiff the sum of sixty-three hundred forty-two and 30/100 dollars (\$6342.30), as aforesaid, on said account upon

demand of defendant, plaintiff, believing defendant's demand to be correctly stated, and that under the tariffs filed, posted and published as aforesaid, the lawful charges were as stated by defendant, to-wit: fifty-eight hundred two and 30/100 dollars (\$5802.30) on the 30th day of January, 1915, paid to defendant and to its agent, in accordance with the provisions of said demand, the sum of three hundred eighty-seven and 70/100 dollars (\$387.70), and on the 17th day of February, 1915, paid to defendant and to its agent, in accordance with the provisions of said demand, the sum of two hundred and twenty-eight dollars (\$228), and plaintiff alleges that in truth and in fact the said account and demand of defendant was not correctly stated, and plaintiff thereby paid to defendant and its agent, on account of defendant's demand so made as aforesaid, and on account of plaintiff's error in the application of the rate established as aforesaid, on the shipment aforesaid, the sum of, to-wit: six hundred fifteen and 70/100 dollars (\$615.70), which was lawfully due from defendant to plaintiff in payment of the charges aforesaid.

## VI.

That prior to the commencement of this suit, plaintiff in accordance with an agreement with its connecting carriers via the lines of which the said cars of cattle were transported, from Hereford, Texas, to the line of this plaintiff, paid such por-

tions of the tariff rate as alleged in paragraph IV of this complaint, as was and is due said carriers under the provisions of the said tariff, and that this plaintiff is now the owner of said account.

## VII.

That although plaintiff has demanded of defendant, payment of the sum of \$281.60, so undercharged as aforesaid, and the sum of \$387.70 so refunded as aforesaid, and the sum of \$228.00 so refunded as aforesaid, defendant has failed and refused, and still fails and refuses to pay plaintiff the said sums or any part thereof; and there is now due and owing from defendant to plaintiff, the sum of eight hundred ninety-seven and 30/100 dollars (\$897.30) with interest on \$281.60 thereof from September 28, 1912, and with interest on \$387.70 thereof, from the 30th day of January, 1915, and with interest on \$228.00 thereof, from the 17th day of February, 1915.

Wherefore, plaintiff prays judgment against defendant in the sum of \$897.30, with lawful interest on \$281.60 thereof from September 29, 1912; with lawful interest on \$387.70 thereof, from the 30th day of January, 1915, and with lawful interest on \$228.00 thereof, from the 17th day of February, 1915, together with plaintiff's costs.

A. C. Spencer,

W. A. Robbins,

Attorneys for Plaintiff.



State of Oregon, County of Multnomah, ss.

I, A. C. Spencer, being first duly sworn, depose and say: that I am one of the attorneys for the plaintiff, Oregon Short Line Railroad Company, and its statutory agent in Oregon; that I make this affidavit for and on behalf of the plaintiff for the reason that said plaintiff, nor any of its officers upon whom service of summons might be made, are not residents of Multnomah County, State of Oregon; that all the material allegations of the foregoing pleading are known to me; that I have prepared the foregoing complaint, know the contents thereof, and the same is true as I verily believe.

(Sgd.) A. C. Spencer,

Subscribed and sworn to before me this 23rd day of October, 1916.

H. W. Berg,

(Seal)

Notary Public for Oregon.

My commission expires June 2, 1919.

Endorsed: In the District Court of the United States for the District of Oregon. (Title of Cause.) Amended Complaint. Filed Nov. 2, 1916. G. H. Marsh, Clerk.

---

And afterwards, to-wit, on the 11th day of November, 1916, there was duly filed in said court an answer in words and figures as follows, to-wit:

ANSWER.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,  
Defendant.

Now comes the defendant and answers the complaint herein as follows:

It admits the allegations of paragraphs I and II of the complaint concerning the organization and business of plaintiff and defendant.

Except as herein admitted, defendant denies each and every allegation of the complaint.

Wherefore, defendant demands that plaintiff take nothing by this action and that it have judgment for costs and its disbursements herein.

Carey &amp; Kerr and

Charles A. Hart,

Attorneys for Defendant.

State of Oregon, County of Multnomah, ss.

I, W. A. Willis, being first duly sworn, depose and say that I am secretary of Portland Cattle Loan Company, defendant in the above entitled action; that I have read the foregoing answer, know

the contents thereof, and that the same is true as I verily believe.

W. A. Willis.

Subscribed and sworn to before me this 10th day of November, 1916.

Oscar Furuset,

(Seal)

Notary Public for Oregon.

My commission expires December 1, 1916.

Endorsed: Filed Nov. 11, 1916. G. H. Marsh,  
Clerk.

---

And afterwards, to-wit, on the . . . day of April, 1917, there was duly filed in said court a stipulation in words and figures as follows, to-wit:

STIPULATION.

Docket 7233.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,  
tion,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,  
Defendant.

It is hereby stipulated by and between Charles A. Hart, attorney for the defendant Portland Cattle Loan Company, and W. A. Robbins one of the attorneys for the plaintiff Oregon Short Line Rail-

road Company, that trial by jury is hereby waived in the above entitled case and we hereby consent to said case being tried by the court.

Dated at Portland, Oregon, this 16th day of April, 1917.

Charles A. Hart,  
Attorney for Defendant.

W. A. Robbins,  
Of Attorneys for Plaintiff.

Endorsed: Filed April 20, 1917. G. H. Marsh,  
Clerk.

---

And afterwards on the 16th day of April, 1917, the same being the 37th judicial day of the regular March term of said court; present the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

A jury having been duly waived by written stipulation of the parties made and filed before said time of trial, said action proceeded to trial before the Honorable Charles E. Wolverton, Judge of said court without a jury.

And afterwards on the 17th day of September, 1917, the same being the 66th judicial day of the regular July term of said court; present the Honorable Charles E. Wolverton, United States District Judge



presiding, the following proceedings were had in said cause, to-wit:

OPINION.

In the District Court of the United States for the  
District of Oregon.

No. 7233.

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,  
Defendant.

No. 7232.

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

vs.

Portland Feeder Company, a corporation,  
Defendant.

A. C. Spencer and W. A. Robbins for Plaintiff,  
Carey & Kerr and Charles A. Hart for Defendants.

Wolverton, District Judge:

These cases were instituted to recover certain balances alleged to be due plaintiff as freight for shipments of cattle, arising by reason of alleged erroneous computations of freight when the shipments were made and settled for; the plaintiff being required to institute the actions under the Federal statutes. Several shipments are involved,

a statement as to one of which will suffice for illustration of the whole.

Forty-four carloads of cattle were shipped from Hereford, Texas, to Amarillo, Texas, the latter being a station on the Pecos & Northern Texas Railway, where the shipment was combined into 43 cars, 27 of which were transported thence over the lines of connecting carriers to Pocatello, Idaho, and the remaining 16 to Butte, Montana, where they were delivered to the shipper.

The plaintiff claims that, under Joint Live Stock Tariff No. 100-A, then in force, the proper charges on these shipments are made up as follows:

Local from Hereford to Amarillo, \$26.40 per car, and from Amarillo to Pocatello, \$116.50, making a total of \$142.90 per car for shipment of the 27 cars. To Butte, the same local from Hereford to Amarillo, to which is added \$125.00 to Dillon, Montana, and the local from Dillon to Butte, \$19.80; total, \$171.20.

The entire controversy centers about the local charge of \$26.40 from Hereford to Amarillo, the defendants insisting that Hereford is a common point with Amarillo, and that the rate designated under section 2 of the tariff constitutes the entire rate from Hereford to Pocatello. This depends upon a proper construction of the tariff. Referring to section 1 thereof, under the head of "The Pecos

& Northern Texas Ry. Co.," will be found lists of stations common with Amarillo, the rate basis being Amarillo; and other lists of stations carrying differentials with Amarillo, that is to say, the tariff indicating that certain sums should be added to or deducted from the Amarillo rate basis. By a note on page 24, it is explained that the differentials shown in section 1 are to be added to or deducted from the Amarillo rates as shown in section 2, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69. By the same note, it is further explained that, where no differentials are shown, the Amarillo rates as shown in section 2 are to be applied as indicated. By another note, explanatory of section 2, it is stated that rates shown in section 2, in columns headed "Amarillo," are to be applied from stations shown in section 1 as taking Amarillo rate basis, or same are to be used as a basis for arriving at through rates from stations shown in section 1 as taking differentials over or under Amarillo rates, where application and routing is provided on pages 56 to 69, inclusive, from such point of origin to destination station. On page 56 is found another note explaining application of rates, which reads:

"Rates provided herein from points of origin shown in Section No. 1 to points of destination shown in Section No. 2, will apply only via the

routes indicated in chart on page 57, except as provided in Item 350."

The exception is without application here. Note 1 to the above explanation further provides:

"Where route number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in Section No. 3."

These several explanatory notes respecting the application of the tariff must be construed together to ascertain their true meaning. Reading the explanatory note to section 1 by itself, and without reference to the succeeding notes, its meaning would appear to be plain that where there were differentials the rates shown in section 2 would not apply, unless the routing was provided on pages 56 to 69; but that, where there were no differentials shown, the shipment would take the section 2 rates without regard to whether the application and routing were provided on pages 56 to 69 or not. The note to section 2 merely emphasizes the thought that shipments from stations carrying differentials with Amarillo will take the through rate only where the application and routing are provided for on pages 56 to 69.

When, however, we turn to the note on page 56 respecting the application of rates, we are advised that rates from points of origin shown in section 1



to points of destination shown in section 2 will apply only via the routes indicated on page 57. This is a specific declaration, general in its scope, without reference to differentials, that the rates so provided will apply only via the routes indicated on page 57. The note thereto is but a reinforcement of the idea. Page 57 is, of course, included within the limitations of pages 56 to 69. So that these later explanatory notes are but a development of the intention which possessed the rate-maker from the beginning, and that must be construed to be that shipments from Amarillo common points, whether carrying a differential or not, shall not take the through rate unless where application and routing are provided on pages 56 to 69.

Recurring again to note to section 1, page 24, the words "as indicated" in the last clause as applying "where no differentials are shown," are susceptible of a construction, though not the natural one viewing the context, as signifying or denoting a reference to the preceding clause and also to the note to section 2, page 32, as this latter note refers back to the item on page 24. So that the aforesaid latter clause would read that the rates shown in section 2 are to be applied as indicated by these explanatory notes, and not by section 2. This idea harmonizes the seemingly inconsistent and incongruous explanatory notes.

But whatever may be the true rendering of the

notes to sections 1 and 2, the notes on page 56 explaining the "application of rates" are directly applicable to the present controversy, as no Oregon Short Line Railroad routing is shown of shipments coming from and over the Pecos & Northern Texas Railway on page 57; and, as we have seen, the regulation is general, and specifically limits the application of rates from points in section 1 to points of destination in section 2 to the routes indicated in the chart on page 57.

This construction of the tariff results in a finding for the plaintiff in each cause of action, and upon all the counts as prayed. The findings will be general, but judgment thereon will be withheld until the defendants have had an opportunity to present such findings as they may deem essential for reserving such questions for review as they may desire.

Endorsed: Filed Sept. 17, 1917. G. H. Marsh, Clerk. By K. F. Frazer, Deputy.

---

And afterwards, to-wit, on Monday, the 17th day of September, 1917, the same being the sixty-sixth judicial day of the regular July term of said court, present the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in the said cause, to-wit:

In the District Court of the United States for the  
District of Oregon,

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,  
Defendant.

This cause was tried by the court before the Honorable Charles E. Wolverton, District Judge, on the merits, and now at this time the court files its opinion and findings of fact in words and figures as follows, to-wit:

"The above cause having been submitted to the court for decision without the intervention of a jury and the court now being sufficiently advised finds for the plaintiff in the sum of \$1,077.77."

(Signed) CHAS. E. WOLVERTON,  
Judge.

Whereupon it is ordered that judgment upon the said findings be and the same is hereby withheld until the further order of this court.

---

And afterwards, to-wit, on the 29th day of September, 1917, there was duly filed in said court motion for entry of defendant's findings of fact and conclusions of law in words and figures as follows, to-wit:

MOTION FOR ENTRY OF DEFENDANT'S  
FINDINGS OF FACT AND CONCLU-  
SIONS OF LAW.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corpora-  
tion,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,  
Defendant.

Now comes defendant and moves the court for  
an order adopting and making and filing the fol-  
lowing as its Findings of Fact and Conclusions of  
Law in the above entitled action:

FINDINGS OF FACT.

I.

Plaintiff is a corporation organized and exist-  
ing under the laws of the State of Utah, and dur-  
ing the times stated in the complaint was engaged  
in the business of transporting freight and passen-  
gers as a common carrier in the States of Utah,  
Wyoming, Idaho and Montana, and in such busi-  
ness was subject to the Act to Regulate Commerce  
approved February 4, 1887, and acts amendatory  
thereof and supplementary thereto, and was at all  
of said times engaged in the transportation of  
freight for hire as a common carrier in connection



with other common carriers from points in the State of Texas and elsewhere to points in the States of Idaho and Montana, and particularly from Hereford in the State of Texas, to Pocatello in the State of Idaho, and from Hereford in the State of Texas to Butte in the State of Montana.

## II.

Defendant is a corporation organized and existing under the laws of the State of Oregon.

## III.

On or about September 28, 1912, A. G. Greenmeyer delivered to Pecos & Northern Texas Railway Company at Hereford in the State of Texas, forty-four carloads of cattle for transportation by freight from Hereford, Texas, over the line of the Panhandle & Santa Fe Railway Company to Amarillo, Texas, and thence over the lines of connecting carriers, and over the line of the Oregon Short Line Railroad Company, plaintiff herein, to Nampa, Idaho, there to be delivered to the Portland Cattle Loan Company, defendant herein, the consignee; and the said railroads, as connecting carriers thereupon transported the said forty-four carloads of cattle from Hereford, Texas, to Amarillo, Texas, where the said forty-four cars were combined into forty-three cars, and were thereupon transported over the lines of connecting carriers, and over the line of this plaintiff to Pocatello, Idaho, at which

place twenty-seven of the said forty-three carloads of cattle, upon the order of defendant, were delivered to Portland Cattle Loan Company, the defendant herein, by said Oregon Short Line Railroad Company, this plaintiff; and thereupon defendant ordered this plaintiff to divert and transport sixteen of the said forty-three carloads of cattle to Butte in the State of Montana, and plaintiff thereupon transported the said sixteen carloads of cattle to Butte, Montana, at which place the said sixteen carloads of cattle were delivered to the Portland Cattle Loan Company, defendant herein, by plaintiff.

#### IV.

At the conclusion of said transportation defendant paid to the plaintiff the sum of \$6,342.30, upon the demand of plaintiff to cover the charges of plaintiff and its connecting carriers for the transportation of said live stock from Hereford, Texas, to Pocatello, Idaho, and Butte, Montana.

#### V.

Thereafter and on the 30th day of January, 1915, defendant presented claim to plaintiff for a refund of the sum of \$387.70, because of the fact that the plaintiff had failed to apply to that portion of the shipment terminating at Pocatello, Idaho, the rate for shipments terminating at Idaho Falls in the State of Idaho, and thereupon plain-

tiff agreed that the Idaho Falls rate was applicable and refunded to defendant the said sum of \$387.70. Before said refund was made the claim of defendant for the refund was passed upon by the General Freight Agent, Auditor, and Freight Claim Agent of plaintiff.

#### VI.

About sixty days after the making of said refund, plaintiff made demand upon defendant for additional freight charges and for the first time stated to defendant that plaintiff and its connecting carriers claimed that an additional charge was due for transportation, to-wit: a charge of \$26.40 per car for the transportation from Hereford, Texas, to Amarillo, Texas.

#### VII.

At the time of the transportation of defendant's cattle, plaintiff and its connecting carriers had duly filed with the Interstate Commerce Commission of the United States, and had posted and published pursuant to provisions of the Act to Regulate Commerce tariffs establishing the lawful charges to be made to all persons for the transportation of cattle in carload lots from Hereford, Texas, to Pocatello, Idaho, and from Hereford, Texas, to Butte, Montana. The tariff so stating said charges was known as Index No. 2050, Joint Live Stock Tariff 100-A, W. A. Poteet, I. C. C. No. 265, effective August 29,

1912. Said tariff provided a through rate of \$116.50 from Hereford to Pocatello, and \$134.80 from Hereford, Texas, to Butte, Montana. Both of said rates were plainly specified by said tariff as applicable to transportation between the points named. By an explanatory note subsequently made in said tariff it was stated that through rates previously shown would apply only via routes indicated in a chart which followed and in said chart no through route was shown from Hereford, Texas, on the line of the Pecos & Northern Texas Railway and Pocatello, Idaho, and Butte, Montana, on the line of plaintiff company; but no reference was given in the positive statement in said tariff of the through rates applicable to such shipments to the foot note referred to, and a preceding note in said tariff explained that the routing limitation referred to applied to stations taking a differential over or under Amarillo, Hereford not being such a station. The freight charges collected by plaintiff at the conclusion of the transportation less the refund made of the Idaho Falls-Pocatello charges were based on said through rates of \$116.50 per car and \$134.80 per car.

## CONCLUSIONS OF LAW.

### I.

The tariff of plaintiff and its connecting carriers duly filed and published according to law and



in force at the time of defendant's shipments was ambiguous in that it justified the charges actually collected, to-wit: on a basis of \$116.50 and \$134.80 per car, and in that in a subsequent portion thereof it undertook to deny such through rates and require the additional payment sued for in this action. Because of such ambiguity the lower rates were the ones applicable and were the only lawful charges established by said tariffs for the transportation of defendant's shipments.

## II.

Defendant is entitled to a dismissal of this action and for judgment for costs and its disbursements.

Carey & Kerr and  
Charles A. Hart,  
Attorneys for Defendant.

Endorsed: Filed Sept. 29, 1917. G. H. Marsh,  
Clerk.

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And afterwards, to-wit, on Saturday, the 29th day of September, 1917, the same being the seventy-seventh judicial day of the regular July term of said court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,

Defendant.

### JUDGMENT.

No. 7233.

Now at this time this cause coming on for entry of judgment herein, plaintiff appearing by W. A. Robbins, one of its attorneys, and defendant appearing by C. A. Hart, one of its attorneys, and it appearing to the court that the respective parties, through their attorneys, entered into a stipulation in writing waiving a jury, and it therefore appearing that said case was called for trial before the Honorable Judge Wolverton on April 16, 1917, and at the conclusion of the trial the court took the case under advisement and requested the attorneys for the respective parties to submit memorandum briefs showing their theories of the application of the tariffs in question, and thereafter and on the 17th day of September, 1917, the court being fully advised in the premises, filed its finding in favor of the plaintiff in words and figures as follows, to-wit: (omitting title) :

"The above cause having been submitted to the court without intervention of a jury, the court being now fully advised, finds for the plaintiff in the sum of \$1077.70.

"CHARLES E. WOLVERTON,  
"United States District Judge."

It further appearing to the court that on September 29, 1917, defendant served and filed in this court and cause, its motion for entry of defendant's findings of fact and conclusions of law, which motion was on said date, presented to and overruled by the court, to which order defendant excepted, and its exception was allowed, and thereupon plaintiff moved for a judgment in its favor, upon the findings heretofore filed, by the court in favor of the plaintiff. It is therefore,

Considered, Ordered and Adjudged, that the plaintiff Oregon Short Line Railroad Company do have and recover of and from the Portland Cattle Loan Company, the sum of \$1,077.70, together with interest thereon from September 17, 1917, until paid, and for plaintiff's costs and disbursements incurred herein, taxed and allowed at \$152.10, and that execution issue therefor.

Dated at Portland, Oregon, this 29th day of September, 1917.

CHAS. E. WOLVERTON,  
United States District Judge.

Filed September 29, 1917. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 29th day of October, 1917, there was duly filed in said court, bill of exceptions in words and figures as follows, to-wit:

**BILL OF EXCEPTIONS.**

**No. 7233.**

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,  
Defendant.

Be it remembered that on the 16th day of April, 1917, this action came before the court, Honorable Charles E. Wolverton, Judge, for trial, plaintiff appearing by W. A. Robbins, Esquire, its attorney, and defendant appearing by Messrs. Carey and Kerr and Charles A. Hart, its attorneys. Whereupon the following proceedings were had:

It appearing that by written stipulation of the parties duly made and filed before said time of trial a jury having been duly waived, the action proceeded to trial before the Honorable Charles E. Wolverton, judge of said court, without the intervention of a jury. Plaintiff offered evidence in support of the issues made by its complaint and defendant offered testimony in support of the



defenses alleged in its answer. There is attached hereto, marked "Exhibit A," and hereby made a part hereof a full and complete stenographic record of the testimony offered and received upon said trial, and of all of the proceedings had in the trial of said cause down to the close of the testimony offered by each of the parties respectively.

Thereafter said action having been taken under advisement by the court, Honorable Charles E. Wolverton, judge, an opinion was handed down and duly filed herein directing and making a general finding in favor of plaintiff, but deferring the entry of judgment until the defendant was given an opportunity to present findings deemed essential for observing questions for review.

Thereafter defendant duly served and filed its motion for the entry of special findings and conclusions of law in its favor, which said motion is in the following form, to-wit:

"Now comes defendant and moves the court for an order adopting and making and filing the following as its Findings of Fact and Conclusions of Law in the above entitled action:

## FINDINGS OF FACT.

### I.

"Plaintiff is a corporation organized and existing under the laws of the State of Utah, and during the times stated in the complaint was engaged

in the business of transporting freight and passengers as a common carrier in the States of Utah, Wyoming, Idaho, and Montana, and in such business was subject to the Act to Regulate Commerce approved February 4, 1887, and acts amendatory thereof and supplementary thereto, and was at all of said times engaged in the transportation of freight for hire as a common carrier in connection with other common carriers from points in the State of Texas and elsewhere to points in the States of Idaho and Montana, and particularly from Hereford in the State of Texas to Pocatello in the State of Idaho, and from Hereford in the State of Texas to Butte in the State of Montana.

## II.

“Defendant is a corporation organized and existing under the laws of the State of Oregon.

## III.

“On or about September 28, 1912, A. G. Greenmeyer delivered to Pecos & Northern Texas Railway Company at Hereford in the State of Texas, forty-four carloads of cattle for transportation by freight from Hereford, Texas, over the line of the Panhandle & Santa Fe Railway Company to Amarillo, Texas, and thence over the lines of connecting carriers, and over the line of the Oregon Short Line Railroad Company, plaintiff herein, to Nampa, Idaho, there to be delivered to the Portland Cattle

Loan Company, defendant herein, the consignee; and the said railroads, as connecting carriers thereupon transported the said forty-four carloads of cattle from Hereford, Texas, to Amarillo, Texas, where the said forty-four cars were combined into forty-three cars, and were thereupon transported over the lines of connecting carriers, and over the line of this plaintiff to Pocatello, Idaho, at which place twenty-seven of the said forty-three carloads of cattle, upon the order of defendant, were delivered to Portland Cattle Loan Company, the defendant herein, by said Oregon Short Line Railroad Company, this plaintiff; and thereupon defendant ordered this plaintiff to divert and transport sixteen of the said forty-three carloads of cattle to Butte in the State of Montana, and plaintiff thereupon transported the said sixteen carloads of cattle to Butte, Montana, at which place the said sixteen carloads of cattle were delivered to the Portland Cattle Loan Company, defendant herein, by plaintiff.

#### IV.

“At the conclusion of said transportation defendant paid to the plaintiff the sum of \$6,342.30, upon the demand of plaintiff to cover the charges of plaintiff and its connecting carriers for the transportation of said live stock from Hereford, Texas, to Pocatello, Idaho, and Butte, Montana.

## V.

"Thereafter and on the 30th day of January, 1915, defendant presented claim to plaintiff for a refund of the sum of \$387.70, because of the fact that the plaintiff had failed to apply to that portion of the shipment terminating at Pocatello, Idaho, the rate for shipments terminating at Idaho Falls in the State of Idaho; and thereupon plaintiff agreed that the Idaho Falls rate was applicable and refunded to defendant the said sum of \$387.70. Before said refund was made the claim of defendant for the refund was passed upon by the General Freight Agent, Auditor, and Freight Claim Agent of plaintiff.

## VI.

"About sixty days after the making of said refund, plaintiff made demand upon defendant for additional freight charges and for the first time stated to defendant that plaintiff and its connecting carriers claimed that an additional charge was due for transportation, to-wit: a charge of \$26.40 per car for the transportation from Hereford, Texas, to Amarillo, Texas.

## VII.

"At the time of the transportation of defendant's cattle, plaintiff and its connecting carriers had duly filed with the Interstate Commerce Commission of the United States, and had posted and published pursuant to provisions of the Act to Regulate Com-



merce tariffs establishing the lawful charges to be made to all persons for the transportation of cattle in carload lots from Hereford, Texas, to Pocatello, Idaho, and from Hereford, Texas, to Butte, Montana. The tariff so stating said charges was known as Index No. 2050 Joint Live Stock Tariff 100-A, W. A. Poteet, I. C. C. No. 265, effective August 21, 1912. Said tariff provided a through rate of \$116.50 from Hereford to Pocatello, and \$134.80 from Hereford, Texas, to Butte, Montana. Both of said rates were plainly specified by said tariff as applicable to transportation between the points named. By an explanatory note subsequently made in said tariff it was stated that through rates previously shown would apply only via routes indicated in a chart which followed and in said chart no through route was shown from Hereford, Texas, on the line of the Pecos & Northern Texas Railway and Pocatello, Idaho, and Butte, Montana, on the line of plaintiff company; but no reference was given in the positive statement in said tariff of the through rates applicable to such shipments to the foot note referred to, and a preceding note in said tariff explained that the routing limitation referred to applied to stations taking a differential over or under Amarillo, Hereford not being such a station. The freight charges collected by plaintiff at the conclusion of the transportation less the refund made of the Idaho Falls-Pocatello charges were

based on said through rates of \$116.50 per car and \$134.80 per car.

## CONCLUSIONS OF LAW.

### I.

“The tariff of plaintiff and its connecting carriers duly filed and published according to law and in force at the time of defendant’s shipments was ambiguous in that it justified the charges actually collected, to-wit: on a basis of \$116.50 and \$134.80 per car, and in that in a subsequent portion thereof it undertook to deny such through rates and require the additional payment sued for in this action. Because of such ambiguity the lower rates were the ones applicable and were the only lawful charges established by said tariffs for the transportation of defendant’s shipments.

### II.

“Defendant is entitled to a dismissal of this action and for judgment for costs and its disbursements.”

Thereafter and on the 29th day of September, 1917, this action came before the court upon plaintiff’s motion for entry of judgment upon the general findings of the court herein and upon a motion of defendant for findings and judgment in its favor, and the court having heard the parties thereupon made and entered its order overruling the motion

of defendant for findings and judgment in its favor and granting the motion of plaintiff for the entry of judgment in its favor. To the order thus made overruling its motion for findings and judgment in its favor defendant excepted and an exception was duly allowed.

Thereupon on said 29th day of September, 1917, judgment was duly entered in favor of plaintiff upon said general findings.

#### ORDER SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions having been presented to the court this 29th day of October, 1917, within the time allowed by order of the court to present the same and it appearing that said bill of exceptions was delivered to the clerk and served upon the plaintiff herein within the time allowed by order of this court, and that no amendments have been offered and no objection made to said bill of exceptions by plaintiff, said bill of exceptions is hereby certified to contain a full and correct record of all of the evidence and exhibits necessary for the presentation of the exception herein noted, and is a record of any and all other matters material to the decision of defendant's writ of error.

Said bill of exceptions is hereby allowed in the foregoing form this 29th day of October, 1917.

CHAS. E. WOLVERTON,

District Judge.

## EXHIBIT A.

No. 7232.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corpora-  
tion,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

No. 7233.

Oregon Short Line Railroad Company, a corpora-  
tion,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,

Defendant.

Before Judge Wolverton.

Portland, Oregon, April 16, 1917-May 14, 1917.

W. A. Robbins for Plaintiff.

C. A. Hart for Defendants.

S. J. H. French .....	10	126
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Portland, Oregon, April 16, 1917. 2 p. m.

Mr. Hart: If your honor please, I should like



to inquire whether it is the desire of the plaintiff to try the two cases together. There are two cases of similarity.

Mr. Robbins: I think the cases should be tried together, your honor, but of course we should expect separate findings.

Court: You do not care to have them consolidated?

Mr. Robbins: I have no objection; either way that suits the court. The same witnesses will testify in both cases.

Court: I was wondering whether it would be better to consolidate the cases, or simply to make findings in both cases.

Mr. Robbins: I think there should be separate findings.

Court: Well, they can be tried together, and the court can make findings accordingly.

Mr. Robbins: I should think that would be the better plan. Don't you, Mr. Hart?

Mr. Hart: I guess so.

Mr. Robbins: Now, if the court pleases, in this case of *Oregon Short Line Railroad Company v. Portland Cattle Loan Company*, we filed an amended complaint, and I just discovered today that the stenographer in transcribing this complaint has made some errors in some of the figures. I would like to correct those figures by intelineation.

Court: Have you any objection to that, Mr. Hart?

Mr. Hart: I presume not, your honor. I would like to know what they are. These are under-charge cases. Your honor probably knows what they are, and knows that, while the public policy may require strict enforcement of tariffs, necessarily there is individual hardship, and it is our position, of course, that we are not going to concede anything in these cases. I don't want to interpose any unnecessary objections; at the same time, I want to preserve every right.

Court: I understand these are clerical errors.

Mr. Robbins: These are clerical errors, which change the figures some.

Court: Well, you can point them out to Mr. Hart. When he has had a chance to see them, the court will make a ruling.

Mr. Robbins: I can make them right now.

Mr. Hart: I have no objection.

#### STATEMENT OF CASE.

Court: Which case are you proceeding on now?

Mr. Robbins: The Cattle Loan case, your honor. I will offer the deposition of R. W. Kelley.

Mr. Hart: What does this go to show, may I ask?

Mr. Robbins: This covers the transaction of Butte.

Mr. Hart: Well, strictly, of course, we ought to have first the proof of the shipment, and that is the proof that has gone astray, as I understand it.

Mr. Robbins: That will be here after awhile. I will have to put it on this way until these other depositions come. They are floating around some place.

Court: Do you say those depositions are in town?

Mr. Robbins: They are supposed to be in town. They were mailed to the other court. The boy just tells me they are around town, and they are looking for them now.

Court: You might go on, then.

(Reading of deposition of R. W. Kelley.)

Court: Mr. Hart, will you admit that that shipment of 16 cars was made?

Mr. Hart: We will admit at least what this deposition aims to show. We will admit that the cars which have been just described were received in Butte, and were delivered to the Chicago, Milwaukee & Puget Sound Company for further transportation to Piedmont, Montana, and that Mr. Kelley, as agent for the Oregon Short Line Company, obtained a receipt from the Chicago, Milwaukee & Puget Sound Company for \$345.60, covering the freight from Butte to Piedmont.

(Reading of deposition completed.)

Mr. Hart: Now, that is the end of that deposition, and I move to strike it out for this reason, if your honor please: The complaint alleges that this particular shipment of 16 cars was destined to Butte, or was diverted to Butte and delivered to the defendant there. The proof shows that this shipment was not delivered to the defendant at Butte, but went on to Piedmont, Montana, on the line of the Chicago, Milwaukee & Puget Sound Railroad; and there is a vital point in that difference. The claim of the Oregon Short Line Company in this case is that they have got to collect this Hereford-Amarillo rate because there was no through rate, through route, between the Pecos & Northern Texas, where they originate, and the Short Line, where they were delivered; but these shipments were delivered on the line of the Chicago, Milwaukee & Puget Sound, and there was a through route between Hereford, on the Pecos & Northern, and the Milwaukee; so that it seems to me that the proof now is inconsistent with the complaint, and in a material respect.

Mr. Robbins: There is nothing inconsistent about that, your honor. It shows that 16 cars moved from Hereford to Butte, and when they got to Butte, the consignee sent them on to Piedmont, and that is the purpose of offering this deposition, to show these 16 cars so moved.



Court: You are seeking to collect this tariff on the shipment from Hereford to Butte, and not beyond that?

Mr. Robbins: To Butte and not beyond.

Court: Has that tariff been arranged beyond that?

Mr. Robbins: That moved under local, as I understand it. That is not involved.

Mr. Hart: This proof shows the shipment went right through.

Mr. Robbins: That local from Butte to Piedmont is not involved in this transaction.

Court: Let me understand. In this shipment there was included a local from Hereford to Amarillo, through rate from Amarillo to Butte, and then after that, from Butte to Piedmont, a local again?

Mr. Robbins: Yes.

Mr. Hart: But the point of my objection is this: The reason they are asking us to pay a local from Hereford to Amarillo is because they say the tariff provided no through rate, no through route between Hereford and the destination of these shipments, and they say in their complaint that the destination of this shipment was Butte, and there being no through route between Hereford, on the Pecos & Northern, and Butte, on the Oregon Short Line, therefore they could not apply any through

rate, and they had to collect the local from Hereford to Amarillo. But it appears from this proof that these shipments did not go to Butte, but went through Butte to a point on the Milwaukee Railway. Now, this same tariff does show that there is a through route and a through rate from Hereford, in Texas, to points on the Milwaukee. So that you have got a material difference there, and you have got a situation which does not give rise to the necessity of this collection from Hereford to Amarillo.

Court: I will overrule the objection. You may have an exception.

Mr. Hart: It is not fair to ask your honor to pass on the whole record, but I wanted to make clear my point now.

Court: Yes, I understand. You claim, then, that the charge was a proper charge, because there was a through rate?

Mr. Hart: Yes, that is, as to these particular Butte cars. Now, that is not the main ground of our defense. I do not want to be understood that that is the only reason I am asserting that there was no necessity for collecting this Hereford-Amarillo rate.

Deposition of C. J. Kelley offered in evidence, and read, with exhibits thereto attached.

Mr. Robbins: I now offer the deposition of John Hamilton.

Mr. Hart: We will admit that Mr. John Hamilton has testified that he recalls a shipment of 43 cars of cattle, billed from A. G. Greenameyer, Hereford, Texas, to the Portland Cattle Loan Company, arriving in Pocatello in October, 1912, and that a representative of the Cattle Loan Company, either Mr. Burke or Mr. Fleming, made settlement of the freight charges there at that time; that his book record shows that transaction, and shows that the amount paid by the Cattle Loan Company was \$7693.25, and that this amount of \$7693.25 consisted of freight charges and feed charges.

Court: That is from Hereford to Butte?

Mr. Robbins: This is part of the 43 cars, yes, he is testifying about.

\* \* \* \* \*

Mr. Robbins: Now, we wish to offer that Exhibit E in evidence, your honor. It has just been marked for identification.

Mr. Hart: What is the purpose of it?

Mr. Robbins: It goes to show a portion of the shipment up there, and the charges that were collected on it.

Court: If I understand this right, there is no controversy about the shipments, nor is there any controversy about the amount of freight collected and the amount charged, and the difference is between the amount of freight charged and collected

and the amount of the freight which you claim ought to have been charged and ought to be paid. Cannot you agree upon a statement of that kind, and cut out all this evidence?

Mr. Robbins: I tried to, your honor, and do not see why we cannot. Counsel has practically admitted that, but since he does not specifically admit it, I am going to go through and try to prove the case.

Mr. Hart: I am ready to say to your honor now, I am free to admit all of the evidence, all of the allegations made with reference to this Pocatello-Butte transaction. That is, I am willing to admit everything that any of these witnesses at Pocatello and Butte can testify to. I do not want to fully admit everything with reference to the other end of it, because I want to see what that proof shows first, which I haven't had a chance to do.

Court: That is the Texas end of it?

Mr. Hart: Yes. But so far as the delivery of these shipments is concerned, so far as the collection of freight charges, all of the facts to which this Pocatello and Butte testimony is directed, I freely admit. I see no purpose in going over the testimony. I do not want to make any concession, or yield any point, that might be of disadvantage to my client. In this kind of a case, certainly if Mr. Robbins failed to prove his case, I ought to be able to take advantage of it. Now, then, I want to



facilitate the proof, and I want to agree to everything testified to by these witnesses.

Mr. Robbins: Well, that certainly will dispose of those witnesses there, your honor. If you will give me just a moment, I think I can dispose of most of these witnesses on that statement of counsel.

Court: The allegation in the complaint is that on or about the 28th day of September, 1912, this defendant caused Greenameyer to deliver to a certain railroad in the State of Texas 44 carloads of cattle. That is admitted, isn't it?

Mr. Hart: No, that is denied. They cannot prove that, if your honor pleases. There is a mistake there in their allegation. I want to see their proof on that score. But passing that, I want to admit most everything else. The point of it is this: That the allegation in the complaint is that this whole contract of shipment was made between Greenameyer and the Panhandle & Santa Fe Railway. That is not the fact. The shipment was made on the line of the Pecos & Northern Texas Railroad.

Court: Does that make any difference?

Mr. Hart: That is the foundation of the case. They are basing their case on the contract of shipment, and I have been waiting to see what their proof would be on that point. The rest of this stuff I do not care about.

Mr. Robbins: Your honor, that doesn't make a

particle of difference. The question is, was that shipment made, and did it take the rate applied to it? The only thing we have to decide is, did that shipment move, and is that the tariff rate applying on it?

Under Mr. Hart's admission, I can dispose of the proof of R. W. Kelley and C. J. Kelley—they are the Butte men. And that will dispose of John Hamilton, H. M. Perleywitz, J. F. Stewart, and W. E. Garvey, ticket agent at Pocatello. That will not dispose of L. R. Wood, though.

Mr. Hart: I admit that, too. Mr. Wood was auditor of the Short Line Railroad, and he testifies about the interline settlements.

Mr. Robbins: He admits interline settlements and the refunds. I don't see any need of reading that.

That is all the depositions we have here in the Cattle Loan case, up to this point. Now, we have some in the Feeder case.

Mr. Hart: The same admissions may be made in the Feeder case.

Mr. Robbins: Are they the same witnesses?

Mr. Rankin: Some witnesses, with the exception of the man receiving shipment at American Falls.

Mr. Robbins: That would be admitted also on the stipulation?

Mr. Hart: Yes.

Mr. Robbins: That disposes of the depositions which we have here now, your honor.

Mr. Hart: If I had had an opportunity to look at the depositions, your honor, I could have told in a minute whether or not there was any point to be made about them. But the Texas depositions have not come. I have had no chance to see whether they make the proof wanted, or whether there is any point to be made about them, or whether I could at once make an admission that would simplify the procedure. Can't we go on with the proof of the rate?

Mr. Robbins: Does your honor want to go on? I will go ahead, if your honor says so, at this time.

Court: I would rather go ahead, if we can.

Mr. Robbins: All right. I will go ahead.

S. J. H. French, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Robbins:

Your name is S. J. H. French?

A. Yes.

Q. And what is your business, Mr. French?

A. I am special rate and tariff clerk of the O.-W. R. & N. Company at Portland.

Q. As special rate and tariff clerk, are you familiar with the tariffs of the other roads, connecting lines, etc.?

A. I am.

Q. Now, how many years' experience have you had in interpreting rates, Mr. French?

A. About fourteen years: six years with the Northern Pacific and some eight years with the O.-W. R. & N. Company.

Q. Six years with the Northern Pacific and eight years with the O.-W. R. & N Company, you say?

A. Directly connected with tariff and rate work, yes.

Q. And where is your headquarters at the present time?

A. Portland, Oregon.

Mr. Robbins: If the court pleases, at this time we desire to offer in evidence certified copies of the tariffs which are applicable in this case. They are contained in two different certificates here, certified by the secretary of the Interstate Commerce Commission, as provided by the act.

Court: Those are the tariff rates?

Mr. Robbins: Yes, your honor, these are tariffs that were in force and effect at the time these shipments moved as certified by the Interstate Commerce Commission.



Received without objection, and marked "Plaintiff's Ex. 1" and "Plaintiff's Ex. 2."

Q. Mr. French, I will ask you if you have examined Plaintiff's Exhibits 1 and 2, at my request, in connection with this case?

A. I have.

Q. I will ask you, what is the effective date of those tariffs?

A. They were filed with the Interstate Commerce Commission April 13, 1909; and they were in force August 29, September 14, and September 28, 1912, the dates these shipments moved.

Q. Now, Mr. French, referring to those tariffs, I will ask you to explain how the rate is made up from Hereford to Amarillo on a caload of stock, of cattle?

Mr. Hart: The Supreme Court of Oregon has held that expert testimony on the subject of the contents of these tariffs is not admissible, in the case of *O. R. & N. Co. v. Coolidge*, in 116 Pacific. I do not urge that decision on your honor here with any particular force, because I believe the tariffs perhaps are unintelligible, or may be unintelligible to your honor. At the same time, strictly speaking, the tariffs are here, and we are at liberty each side to argue what we think they mean, and it is for the court to say what they mean. Now, if the court feels that testimony of this kind will aid it, I have

no objection to make, although I want it understood, of course, that this witness is merely voicing the plaintiff's idea of what the tariffs mean.

Mr. Robbins: Right along that line, your honor, the United States Supreme Court has said that the public is charged with knowledge of the contents of those tariffs; and I do not think there is one per cent of the public can read a tariff. I have been in this business 12 years, and I cannot read a tariff, and I do not believe your honor can. Now, here is a man that has put in his life at that business. I am asking him what those tariffs show. I propose to show where he is reading from. That is all I am asking him to do.

Court: I was going to remark that tariffs are sometimes very hard to understand, and if you have an expert on the subject, it might enlighten the court.

Mr. Hart: Of course, I expect to put on an expert myself. If we have one on one side, I want one on the other. I am perfectly willing to admit them without such expert testimony, because I think we can enlighten the court as to our side of it.

Court: Very well, I would be very glad to hear both sides.

Q. Proceed, Mr. French.

A. Hereford, Texas, is 47 miles south of Amarillo, and, at the time these shipments moved was located on what was known as the Pecos & North-

ern Texas Railroad, now the Panhandle & Santa Fe Railroad. The rate on cattle from Hereford to Amarillo at the time these shipments moved was \$26.40 for 36 ft. 6 inch car, and that rate is made up by using the Santa Fe System distance table 9900, I. C. C. No. 4763, which was in force August 29, September 14 and September 28, 1912, the dates these shipments moved, and shows the distance from Hereford to Amarillo 47 miles. A. T. & S. F. Tariff, I .C. C. 5820, Santa Fe System No. 6016-E, provides rate of 12 cents per 100 pounds of cattle, carload.

Mr. Hart: You are now explaining the basis of this local rate?

A. I am.

Mr. Hart: Why is that necessary?

A. Because it is a factor in the through rate.

Mr. Hart: It isn't possible that is material.

A. Carload minimum 22,000 pounds for cars 36 feet 6 inches and over 34 feet, \$26.40 per car. That is the authority for the rate from Hereford to Amarillo.

Mr. Hart: Let me ask if that is shown in either of the two certified copies of the tariffs you have before you?

A. It is.

Q. Then the rate from Hereford to Amarillo is \$26.40 a car?

A. For 36 ft. 6 inch car.

Court: That is what you call the local rate?

A. That is the local rate, sir, from Hereford to Amarillo. That is the only rate, in fact, and was at the time these shipments moved from Hereford, to Amarillo, Texas.

Court: There is no through rate from Hereford?

A. There was no through rate from Hereford to these points of destination.

Q. Now, then, what do those exhibits show there the rate is from Hereford to Pocatello; that is, was on the date in question of course?

A. From Hereford to Pocatello the rate was \$116.50, for 36 ft. 6 inch car. This is provided, or rather shown, Index No. 2050, page 50, Joint Live Stock Tariff 100-A, W. A. Poteet, Agent, I. C. C. No. 265, in force August 29, September 14, and September 28, 1912; and provided this rate of \$116.50, from Amarillo to Pocatello.

Court: That is from Amarillo?

A. From Amarillo to Pocatello.

Court: That is from Amarillo, not from Hereford?

Mr. Robbins: He will explain that in just a moment, your honor. It is necessary for him to explain Amarillo to Pocatello first.

Court: Very well.

A. From Amarillo to Pocatello, the point shown



in the tariff, your honor, is Idaho Falls. Pocatello is intermediate with Idaho Falls, and under the intermediate application the rate to Idaho Falls applies as a maximum at Pocatello. By adding these two rates together, the \$26.40 from Hereford to Amarillo as provided in that Santa Fe tariff 6016-E, that I have just quoted, plus the rate of \$116.50 from Amarillo to Idaho Falls, which applies as a maximum at Pocatello, you have the through rate from Hereford to Pocatello of \$142.90, for 36 ft. 6 inch car.

Court: Idaho Falls is how far from Pocatello?

A. Idaho Falls is—well, it is about 50 miles, I should say.

Court: Do you say the same rate applies to Idaho Falls as applies to Pocatello?

A. Yes, sir.

Court: Very well.

Q. Now, then, what do those exhibits show the rate from Hereford to Butte?

A. Well, from Hereford to Butte you would use the same tariff reference as from Hereford to Amarillo, which authorized the rate of \$26.40 I previously quoted, plus rate of \$125 for 36 ft. 6 inch car from Amarillo to Dillon, as shown in index 2060, page 50, Joint Live Stock Tariff 100-A, W. A. Po-teet, Agent, I. C. C. 265, in force August 29, September 14, and September 28, 1912, the date these

shipments moved; that is the rate from Amarillo, Texas, to Dillon, \$125 for 36 ft. 6 inch cars, which, plus the rate of \$26.40 from Hereford to Amarillo, same size car, made the two factors, or the rate from Hereford to Dillon. The farthest point north on the O. S. L. is Dillon, Montana, to which rates are provided from Amarillo; therefore, we must add the local rate from Dillon to Butte in order to make the through rate. In other words, we have the three factors—\$26.40 Hereford to Amarillo, \$125 Amarillo to Dillon, and \$19.80 from Dillon to Butte. The latter rate is authorized Index No. 15, page 9, O. S. L. Local and Joint Tariff 3281, I. C. C. 1469, in force August 29, September 14, and September 28, 1912. This tariff provided a rate of \$18 for 30 ft. car Dillon to Butte, and Supplement No. 14 to the same tariff, effective March 7, 1912, provided 110 per cent of this rate for cars over 33 ft. 9 inches to and including 36 ft. 7 inches. That would include 36 ft. 6 in. car, which made the rate \$19.80 for 36 ft. 6 in. car from Dillon to Butte. By adding the three factors from Hereford we have a total of \$171.20 from Hereford to Butte.

Q. Then, your testimony, as I get it, is Hereford to Amarillo \$26.40?

A. Correct.

Q. Hereford to Pocatello is \$142.90?

A. Amarillo to Dillon is \$125, Dillon to Butte \$19.80, making a through rate of \$171.20. I am not

figuring on the Hereford-Pocatello, Mr. Robins; I am figuring on the Dillon-Butte rate. That was the last one you gave me.

Q. I know it is the last one, but I am going over these again.

A. All right.

Q. Now, you first testified the rate from Hereford to Amarillo was \$26.40?

A. Correct.

Q. Now, what did you say the rate was from Hereford to Pocatello?

A. I said the rate from Amarillo to Pocatello was \$116.50, if you are going back to that.

Q. What is the total? What is the total charge?

A. The total charge from Hereford to Pocatello—is that what you are wanting now?

Q. Yes.

A. \$142.90.

Q. That is exactly what I said. Now, then, you also testified that the rate from Hereford to Butte is \$171.20?

A. Correct.

Q. All right. Now, then, let us turn to the Feeder Company a minute. I am now referring to the first cause of action in the Feeder case. What does the exhibit show the rate to be from Hereford to Monida, Montana?

A. The rate from Hereford to Amarillo is \$26.40, as previously stated. The tariff authorities quoted are the same. From Amarillo, Texas, to Monida, Montana, the rate is \$118.50 for 36 ft. 6 in. car. That rate is carried Index 2056, page 50, Joint Live Stock Tariff 100-A, W. A. Poteet, Agent, I. C. C. 265, in force the dates of shipment, August 29, September 14, and September 28, 1912. And those two rates—\$26.40 from Hereford to Amarillo and \$118.50 from Amarillo to Monida, make the through rate of \$144.90.

Q. I am now referring to the second cause of action in the Feeder case. What does that exhibit show the rate would be from Abernathy, Texas, to Pocatello?

A. Abernathy, Texas, was located on the at that time Pecos & Northern Texas Railroad, 105 miles southeast of Amarillo, and the rate from Abernathy to Amarillo was \$39.60 for 36 ft. 6 in. car. That rate is carried, or rather the basis for that rate, the Santa Fe System Distance Table 9900, I. C. C. 4763, which shows the distance from Abernathy to Amarillo 105 miles, and A. T. & S. F. Tariff, I. C. C. 5820, Santa Fe System No. 6016-E, which provides rate of 18 cents per hundred on cattle, carload, minimum 22,000 pounds, for cars 36 ft. 6 in. and over 34 feet. From Amarillo, Texas, to Pocatello, Index No. 2050, page 50, Joint Live Stock Tariff, 100-A, W. A. Poteet, Agent, I. C. C.



265, in force August 29, September 14, and September 28, 1912 provides rate of \$116.50 from Amarillo to Pocatello. These two rates added together produce a total of \$156.10 the correct through rate.

Q. Now, how about the rate from Abernathy to American Falls?

A. From Abernathy to Amarillo the same tariff above referred to authorized a rate of \$39.60 for 36 ft. 6 in. car, and from Amarillo to Pocatello the same tariff authorizes—

Court: That is \$116.50?

A. Index 2050, page 50, Joint Live Stock Tariff No. 100-A, W. A. Poteet, Agent, I. C. C. 265, in force at date of shipment, provides the rate \$116.50 from Amarillo to Pocatello; that being the Idaho Falls rate, Pocatello being intermediate. From Pocatello to American Falls the rate is \$14 for 36 ft. car; the authority for this rate being Index 244, page 12, Local and Joint Freight Tariff, O. S. L. No. 2062-B, I. C. C. 1781, in force August 29, September 14, and September 28, 1912, the dates these shipments moved.

Court: What was that rate from Pocatello to American Falls?

A. \$14, sir. American Falls is 50 miles west of Pocatello, on the O. S. L., and we add that \$14 for that 50 miles off to the Pocatello rate. These three factors, \$39.60 Abernathy to Amarillo, \$116.50 Am-

arillo to Pocatello, and \$14 Pocatello to American Falls, produce the true rate of \$170.10.

Q. So on the second cause of action, your testimony is, then, that the rate from Abernathy to Pocatello is \$156.10 and from Abernathy to American Falls is \$170.10?

A. Correct.

Q. Now, Mr. French, on what line of railroad are Hereford and Abernathy located?

A. They are located on the, at the time of movement, Pecos & Northern Texas Railroad.

Q. And what is the fact as to whether or not Amarillo is a junction point?

A. And Amarillo, it is one of the points north on the Pecos & Northern Texas Railroad at that time, now the Santa Fe & Panhandle.

Q. What line of railroad, then, extends from Amarillo to Texline?

A. Fort Worth & Denver City extends from Amarillo to Texline, and the Colorado & Southern from Texline to Denver.

Q. And then what road from Denver to Granger?

A. From Denver to Granger the Union Pacific; from Granger to Pocatello the O. S. L.

#### Cross Examination.

Questions by Mr. Hart:

Mr. French, I don't just understand how you get

at this local rate of \$26.40 from Hereford to Amarillo. Will you please take the tariff showing that rate and point it out to the court?

A. Yes, sir, I will be glad to point it out to the court. If your honor pleases, this is a little chart that I made for my own convenience, and here is Hereford, and here is Amarillo, and here is Abernathy. Now, this is an extract—

Q. You are referring now to Exhibit 2?

A. Exhibit 2 shows an extract of the A. T. & S. F.—Santa Fe System Distance Table No. 9900, and that shows the distance from Amarillo to Canyon City as 18 miles. Here is Amarillo and here is Canyon City. Now, from Canyon City to Hereford—here is Hereford—is 29 miles, making a through distance of 47 miles. Now, the rates on cattle from and to those points are carried in the Santa Fe System Tariff No. 6016-E; and this tariff is on file with the Interstate Commerce Commission under I. C. C. No. 5820; and that provides for distances of 50 miles, on cattle in carload, 12 cents per hundred pounds.

Court: This is less than 50 miles?

A. Yes; and so it says, "When exact distance is not shown, use next greater." We used 50 miles, although the actual distance is 47. Now, for 47 miles, or 50 miles as shown here, the rate is 12 cents, on cattle in cars. It says on cars 36 ft. 6

inches and over 34 feet; and the minimum is 22,000 pounds, which at 12 cents a hundred makes the \$26.40 from Hereford to Amarillo. Now, the same formula would be gone through from Abernathy, only the distance is 105 miles from Abernathy to Amarillo, and we use the 18-cent rate, because for distance of 110 miles, you see; it says, "Where exact distance is not shown, use the next greater," and we have used the next greater, 110 miles; the rate of 18 cents is used, which produces the \$39.60.

Court: You haven't got the mileage marked on here.

A. Yes, sir. Excuse me—105 miles. That is the tariff, and the only tariff they have providing a rate between those two points. And this is an extract of it.

Q. Now, just a minute. This is your conclusion, that these extracts are the only tariffs applicable to that Hereford-Amarillo proposition?

A. Yes.

Q. You haven't got the full tariffs here? You merely have sheets from the tariffs—extracts from the tariffs?

A. Well, this is the extract furnished by the Interstate Commerce Commission of the tariff applying between those points.

Q. Well, who is going to determine whether or not that is the one that is applicable—you or the



commission? The commission's certificate is simply that this is a true copy of that extract, isn't it?

A. Yes. But that is the tariff that authorized the rate between those points, and the only tariff they had at that time.

Q. That is your testimony to that effect, I understand, yes. But I don't want you to convey the impression to the court that the commission says that that is the rate from Amarillo.

A. Well, the commission certifies that.

Q. Certifies that that is a true and correct copy.

Court: How did they come to certify that? By inquiry from some one in order to get the tariff rates, or the basis for the tariff rates?

A. Did you write? I presume this was furnished on the request of the Oregon Short Line, your honor.

Mr. Hart: The point is, your honor, we don't ordinarily prove a rate by getting what some rate clerk conceives to be the item applicable—getting a certified copy of that. We should have a certified copy of the tariff.

Court: Have you got that?

Mr. Hart: No, I have not, as to that local rate.

A. I see the point Mr. Hart is making.

Mr. Robbins: Pardon me just a moment. Maybe I can answer your question right here. Well, go

ahead, we will find out—we will show you why they certified to that.

Mr. Hart: Let me place before your honor while I am questioning Mr. French a copy of this general live stock tariff. I don't mean the one quoting the local rate from Hereford to Amarillo—I mean the tariff quoting the live stock rates from Texas points to Idaho and Montana points.

Court: This is the through rate?

Mr. Hart: Yes; and that is a copy of this tariff which is Plaintiff's Exhibit 1.

Court: There is no question as to the through rate?

Mr. Hart: The question is whether or not the through rate from Amarillo was not also applicable from Hereford.

Court: Oh, yes.

Mr. Hart: And, of course, that is to be determined by a construction of this through rate tariff.

Q. Mr. French, the through rates from Amarillo and such points are shown in this Joint Live Stock Tariff No. 100-A, which is a part of this Plaintiff's Exhibit 1, are they not?

A. Yes.

Q. Now, this Joint Tariff 100-A is divided into three sections—section 1, section 2, and section 3,—is it not?

A. Correct.

Q. Section 1 undertakes to provide what is said to be the basis, from points of origin, for rates on range cattle and also horses? That is correct, is it not?

A. With certain differentials, yes.

Q. Yes. In other words, it names certain points which are said to be "base" points?

A. Yes.

Q. And from which through rates are applicable?

A. Yes.

Q. And then it lists stations in the vicinity of those base points, and gives the information about rates from those points, and as to whether or not the base point rates apply or differentials are applicable—that is, a greater or a less rate is applicable? That is correct?

A. Yes.

Q. So that in section 1 of this tariff we have a list of stations on all the Texas lines, or on most all of the Texas lines, and a statement, or rather information, as to each one of those points, showing whether or not the through base-point rate is applicable, or, if not, how much of a differential over or under the base-point rate is applicable? That is true, is it not?

A. It is true when qualified by the application in the tariff.

Q. Yes, now, we get at that a little later. But I refer you, first of all, then, to page 26 of the tariff, that is, section 1 of the tariff. Under the heading "The Pecos & Northern Texas Ry. Co." on page 26 appears a list of stations among which is the station of Hereford, and the index number given is 98. That is correct, is it not?

A. Yes.

Q. And directly opposite, under the heading of "Rate Basis" is the word "Amarillo"? That is correct, is it not?

A. That is shown there on that table.

Q. So that, so far as the tariff makes it applicable, Hereford gets the same rate as Amarillo?

A. To certain points as qualified by the application and routings as in the tariff. Not to points on the Oregon Short Line.

Q. Just a minute. That is your contention, I understand.

A. Yes.

Q. But we will get this step by step.

A. Yes.

Q. Except as may be qualified by something which may later appear in the tariff, we have here on page 26 of the tariff, a statement that Hereford gets the same rate as Amarillo?



A. To certain roads, quite true.

Q. To certain roads—yes, that is true?

A. Quite true.

Q. Now, then, we turn over to page 50 of the tariff; and I refer you there to the middle paragraph, headed "Oregon Short Line R. R." But let me ask you first if this section 2 does not undertake to provide the rates in dollars and cents from the originating points—originating base points, we will say, in Texas to points in the Northwest?

A. It undertakes to provide through rates from Amarillo to points on the O. S. L.

Q. It undertakes also to provide through rates from El Paso and Deming, doesn't it?

A. Oh, to certain roads.

Q. From these base points to certain destinations?

A. Yes, as provided in the tariff.

Q. Now, then, I ask you to look at this middle paragraph on page 50 of section 2, and say whether or not this tariff does not show a rate of \$116.50 from what is called the "Amarillo Group" to Idaho Falls?

A. It does from the Amarillo Group to Idaho Falls, on cattle in lots of ten cars or more.

Q. Yes. And that is the basis of your statement to the court awhile ago that the through rate from Amarillo to Pocatello was \$116.50?

A. From Amarillo, yes.

Q. From Amarillo only, you said?

A. From Amarillo only.

Q. Now, this tariff section 2, this paragraph of it, quotes this rate from the Amarillo Group? That is true, isn't it?

A. Yes.

Q. And then we go back to section 1 of the tariff to find out what the Amarillo Group is, and we find, do we not, on page 26 of the tariff, the list of stations which are included in the Amarillo Group? That is true, isn't it?

A. To certain points on certain lines, Mr. Hart, but not for the O. S. L.

Q. We will get at this qualification a little later. I know how keenly you feel about it, but let us get at this step by step. We find on page 26, do we not, that list of stations comprising the Amarillo Group?

A. You do.

Q. In that list of stations we find the station of Hereford?

A. Hereford.

Q. So that, unless there is some limitation in this tariff which denies that rate, these two combinations, this section 1 and section 2, would put Hereford in the Amarillo Group, and give it the Amarillo rate? That is correct, is it not?

A. But I claim there is a restriction.

Q. I know what you claim, but please answer my question. Except for the limitation which you think there is in the tariff, we have here explicitly Hereford in the Amarillo Group?

A. Yes.

Q. All right. Now, let us hunt up this limitation.

Mr. Robbins: You may make any explanations you like of those answers, and qualify them as you go along.

Mr. Hart: I will try to be fair with Mr. French.

Q. Let us get at this limitation which you think prevents Hereford from being in the Amarillo Group. I refer you now to page 24 of the tariff. Page 24 gives an explanation of section 1 of the tariff, does it not?

A. Yes. It mentions there "Item 200—Governing use of differentials shown in Section No. 1, pages 24 to 31 inclusive."

Q. Let me read the first paragraph of that explanatory note to you. It says: "The differentials shown in Section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates as shown in Section No. 2 hereof, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69."

A. "Where application and routing is provided on pages 56 to 69."

Q. Yes. That is your point, then? That is the whole point in it, is it not? Your whole idea is, in using this Section No. 1, and in finding out that Amarillo includes Hereford in its group, we have got to take into consideration this explanation which says you use these differentials "where application and routing is provided on pages 56 to 69"?

A. Not only that, but there are other provisions in the tariff which are specific, and restrict the rates so that they do not apply to points on the O. S. L. from south of Amarillo.

Q. All right. Let us turn to page 56, if you please. Let us see what this limitation is which is to be taken into consideration in applying these differentials. Page 57 is a chart, which is called "Chart of Routes," is it not?

A. It is.

Q. Yes. And on the opposite page, page 56, there are certain explanations showing how that is to be understood?

A. Yes.

Q. And that explanation contains, under the heading "Note 1," Item 360, "Where Route Number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in Section No. 3." Now, then, you turn to your chart opposite, and you get the point at which the Oregon



Short Line column and the Pecos & Northern Texas column meet, and there is no route number?

A. Correct.

Mr. Hart: Does your honor see that?

A. Two little dots, right down the column of the O. S. L. and then across from the Pecos & Northern Texas.

Q. You get no number?

A. There is no routing there.

Q. So that, applying that explanation there, we have a situation in which there is no route number, and therefore no through rate, from the Pecos & Northern to the Oregon Short Line?

A. Correct.

Q. And that is your reason for saying that the Amarillo rate cannot be applied from Hereford?

A. From Hereford.

Q. All right. Now, then, we were referred to this section 3, to these pages 56 and 57, we were referred to those pages when we were at section 1 finding out how to apply this group basis, were we not?

A. Yes.

Q. And we had this explanation, that "The differentials shown in Section No. 1"—I am now reading from this explanation which precedes section 1—we were told that "The differentials shown in Section No. 1 are to be added to or deducted from

the Amarillo rate, to arrive at the through rate, where application and routing is provided on pages 56 to 69." So that if no through routing was provided on pages 56 to 69, then we could not apply these differentials? That is true, is it?

A. Well, the chart on page 69 shows—or what is the page, 56?

Q. 57.

A. The chart on page 57 shows a blank space from Pecos & Northern Texas Railroad points to points on the Oregon Short Line. Therefore there is no routing provided, and consequently the rates from points on the Pecos & Northern Texas Railroad would not apply to Pocatello, or Dillon, or Butte, or points on the O. S. L.

Q. Your reason for saying that is because section 1 here explains that these differentials which are allowed above or under the basing rates, above or under the Amarillo rates, can only be applied when you have got a route number—when you have got a through route? That is the point, is it?

A. Yes, there are quite as many blank spaces on that page 57, Mr. Hart, as there are routings shown.

Q. All right. We understand that. I just want to make sure that that is the basis of it all.

A. Yes.

Mr. Hart: Section 1, as your honor knows, states these base points—states what stations take the same rate, what stations have differentials.

Q. And then we come to this explanation of section 1, which says the differentials shown in section 1 are to be added to or deducted from the Amarillo rate so as to arrive at the through rate, where there is an application and routing shown on page 57 of the tariff?

A. Yes.

Q. Now, then, having settled that, let us get to the following paragraph of this explanation of section 1, and I refer you to that, page 24, and I read this: "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated." Now, do you find any reference whatsoever in that paragraph to pages 56-69 of the tariff and the routing application?

A. That paragraph refers to rates to points where rates are authorized. You referred to Piedmont a short time ago, Montana, on the C. M. & St. P. The rate would apply by Council Bluffs, where the C. M. & St. P. would get their haul to Piedmont, get the long haul, that rate would apply via that route. But apply that rate by the Colorado Southern, and the Fort Worth & Denver City, and the Pecos & Northern Texas up to Granger, plus our rate to Dillon, and then the rate to Butte, and then through the other way, the Milwaukee are entitled to their local from Butte to Piedmont. That clause one applies, Mr. Hart, on shipments as authorized

to destinations on different lines, as authorized by the tariff. But under the application on page 56, if I am not mistaken, of the tariff, you will find—let me read that please. Page 56. You will find a clause here in Item 360: “Rates provided herein from points of origin shown in Section No. 1 to points of destination shown in Section No. 2, will apply only via the routes indicated in chart on page 57, except as provided in Item 350. Note 1.—Where route number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in Section No. 3.” Section 3 is miscellaneous rates. Then it says: “Note 2.—The insertion of a route number is not to be construed as indicating that rates named will apply from all points on the originating line to all points on the destination line via any or all intermediate lines. The data shown on pages 58 to 69 inclusive opposite the route number indicated specifically describes the points of origin, the routes and the points of destination.” Now, I would like to elaborate here a little.

Q. You haven't got the point of my question. I don't want to cut in on your explanation.

A. Excuse me a moment. I would like to illustrate. We have certain rates from interior points on our line—like Walla Walla and Pendleton, on Camas Prairie Railroad, which you know is oper-



ated by the O.-W. and Northern Pacific alternate years, as party to that tariff. The common point rates do not apply from certain points, like Grangeville, there are arbitraries or differentials, or there may be local rates provided for that point. The same way with Portland, for instance, to Eastern territory, the North Coast terminal rates will apply; whereas if the shipment originated at Estacada, for example, the local rate from Estacada into Portland would be added to the through rate to Kansas City, or New York, or New Orleans. Now, in this instance, there is no specific routing provided from Hereford or Abernathy; consequently we must use the local rate from those points to Amarillo, the basing point, plus the rate from Amarillo to these Oregon Short Line points, for the reason that there is no rating shown in this tariff to Oregon Short Line points; and if we concede, your honor, that this tariff authorizes through rates from Hereford and Abernathy to points on the Oregon Short Line, then that concession must void every blank space on this page, which is put there—the blank space is put there to illustrate the fact that the through rates do not apply from those points; and that is the only difference between the numbered spaces, where the routings do apply, and the blank spaces, where the routings do not apply. Now, that is my construction of the tariff.

Q. Amarillo is on the Pecos & Northern Texas, is it not?

A. Amarillo is on the Pecos & Northern Texas.

Q. And there isn't any question but what there is a through rate and a through route from Amarillo to Pocatello?

A. Conceded.

Q. Yes, sir. So that we cannot read this quite literally, can we, this chart, where it says there are no through rates from Pecos & Northern points to Oregon Short Line points?

A. This Amarillo happens to be the basing point there. El Paso or Deming might be the basing point from some other territory. But you cannot, Mr. Hart, read into that tariff an application that is not there; and I do not consider that there is a routing authorized in that tariff.

Q. Supposing there is not, we have a through routing authorized from Amarillo, on the Pecos & Northern, to Pocatello, in Idaho, on the Oregon Short Line?

A. Admitted.

Yes. Now, then, the sole question is, have the makers of this tariff undertaken to extend that Amarillo rate to Hereford and absorb it in any way they choose in their division?

A. There is, as you said, a through rate from Amarillo to Pocatello. There is not a through rate

from Hereford or Abernathy, nor is there any authority for it in the tariff, because the routings are not specified from Abernathy or Hereford. I admit there is a through rate from Amarillo to Pocatello. I quoted it—\$116.50.

Q. Let us get back, if you please, where you were when you started this explanation. Take this section 1 again, on page 24 of the tariff, which explains how these groupings are to be taken, and how the rates applicable from grouping are to be applied, and we have this explanation which says, so far as differentials are concerned, differentials over or under the Amarillo rate, they are to be added or deducted to make the through rate, where application and routing is shown on page 57, etc.

A. Yes.

Q. And you say, then, that in order to use those differentials you have got to go back and see whether there is a routing?

A. Precisely. But you are—

Q. Yes. Now, just a moment. The next paragraph deals with cases where there are no differentials shown?

A. Yes, sir.

Q. Now, as to Amarillo and Hereford there is no differential, according to this grouping, Hereford takes the same rate as Amarillo?

A. Not to points on the O. S. L., Mr. Hart.

Q. Well, you are going back to the end of the tariff again. I ask you if, in section 2 of this tariff, Hereford is not shown to be in the Amarillo group?

A. Excuse me a moment. You are using the description there referring to group one of the tariff. You are not using the application of rates, which is authorized only in one place in the tariff, and that is page 56.

Q. I am trying to do what the shipper would do if he was endeavoring to get at the correct rate.

A. Precisely.

Q. Now, this explanation of the groupings has two clauses. The first refers to instances where there are differentials—in other words, to cases where there is a small addition to or deduction from the Amarillo rate?

A. Correct.

Q. That is the first paragraph; and it says you can use those differentials only when you have a routing and application as shown in the end of the tariff?

A. Yes, sir.

Q. In other words, you are given a specific reference to go to the tariff and find out whether you have got your through routing and application?

A. Yes.

Q. Now, then, you come next to the case we are interested in here?



A. Yes.

Q. That is, where there are no differentials shown. In other words, where the Amarillo rate is said to be the same as the Hereford, and where these lists of stations comprising the Amarillo group take the same rate as Amarillo, so far as section 2 is concerned. Now, look to your explanation to find out how you are going to apply that situation, where there are no differentials, and the explanation is that "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated."

A. "As indicated."

Q. Now, will you tell the court—

A. Excuse me, Mr. Hart—"as indicated."

Q. Will you tell the court why it is necessary for any one to go one step farther when he has secured that information—he has gone to the index and been referred to section 1, to find that Hereford is grouped with Amarillo; then he has gone to section 2, to find that the Amarillo rate is \$116.50; and then this explanation that where no differentials are shown the Amarillo rate is to be applied—no reference to the routing at the end of the tariff?

A. Well, if it pleases your honor, I have admitted that there are through rates from Amarillo to Pocatello, which is the Idaho rate, from Amarillo to certain other points on the Oregon Short

Line; but those differentials, or the through rates, as authorized, based on the Amarillo rate, from Hereford or from Amarillo, apply to C. B. & Q. station—to C. M. & St. P. stations—to Colorado & Southern stations—to Denver & Rio Grande stations; consequently they say “as indicated;” and under the application, your honor, on page 56, they say that the rates will apply under the routings as authorized by the application; and then on page 57 on your chart they indicate as plainly as they can—they cannot show all the stations on the Oregon Short Line—they indicate as plainly as they can by dots or blank spaces that there is no through routing, consequently no through rates, from Abernathy or Hereford, or any point, in fact, south of Amarillo. I am only admitting there are through rates from Amarillo to points on the Oregon Short Line. Under that tariff, there are no through rates from points south of there to points on the Oregon Short Line.

Q. Well, then, Mr. French, do I understand you to say that the words “as indicated” at the end of that sentence are to take the place of the last clause of the preceding sentence? In other words, they are intended to refer you to page 56 and following of the tariff for routing?

A. You have only taken the description there as to your first section of your tariff, Mr. Hart.

Q. Yes, but you said a moment ago—

A. Excuse me a moment.

Q. All right.

A. You must consider that the second section of the tariff names the rates from Amarillo to points on the Oregon Short Line.

Q. Yes.

A. I have not admitted that rates are provided from points south of Amarillo. Now, then, having those through rates from Amarillo, you only have them where the routing is shown by numerals on the chart on page 57; but you haven't got them from other points, because under your application, which is the key to the instructions in the tariff, which is the same as our application under our transcontinental tariff—we have rates to North Coast terminals—we have rates to Oregon points and to Spokane points—you couldn't use the North Coast rates to all of the interior.

Q. If it is not necessary, then, for us to be given a reference to any routing or application when we look up these rates—

A. Certainly, sir, that is the first thing you refer to in a tariff.

Q. Wait a minute. (Continuing), why is it necessary, when we are speaking of differentials, taking a station which is near Amarillo, and this tariff, section 1, shows a differential of \$5.00 less. Now, we look at the application—we want to know

whether we are going to get that differential, or whether we will have to pay the local rate to Amarillo. We look at this explanation preceding section 1, and we see it says this differential we can only obtain where there is application and routing provided on pages 56 to 69?

A. Yes.

Q. So we know that, when we have this differential of \$5.00 less, we can only use it and avoid the local rate when there is this application and routing?

A. Yes, sir.

Q. Now, then, we come to the next station which is shown to be in the Amarillo group, without any differential, and we look again to this explanation to see whether we are going to be able to get that Amarillo rate, and we don't find any reference in that explanation to any routing or application. We find merely the statement that "Where no differentials are shown, the Amarillo rate as shown in section 2 is to be applied as indicated?"

A. *As indicated.* Certain lines are agreeable to the application of the Amarillo rate to points on their line. The Milwaukee and the Burlington and other lines. The Oregon Short Line is not.

Q. So the words "as indicated" are what you think will give you the reference?

A. I do, because in that particular section of

the tariff—now, you are not taking the other portion of the tariff, which is on page 56—the application of the tariff is the key to the situation, and that specifically states, Mr. Hart, page 56, that the rates will not apply except where the routings are specified in the chart on page 57. You find a blank space on page 57.

Q. Now, Mr. French, we will suppose these tariffs, of course, are open to shippers and railroads alike, and the shippers are charged with knowledge of them?

A. Yes.

Q. So that, theoretically at least, they are supposed to be explainable—supposed to be readable by the shipper who comes to get a rate?

A. Yes.

Q. Now, the shipper comes in this instance to find the rate from Hereford to Pocatello, and he goes to the index to find Hereford first, and he looks in the index of points of origin, and he finds on page 5 of the tariff Hereford, Texas, P. & N. T. Ry., and he is referred to item 98 of the tariff. Then we look up this item 98, and we find Hereford listed under the heading, "Pecos & Northern Texas Railway Company," and giving it the rate basis of Amarillo. Now, that is what the shipper does. He finds first of all, by reference to the index, that from Hereford on the Pecos & Northern Texas Railway—or that is, that Hereford is in the



so-called Amarillo group. Now, then, he goes to Amarillo. He looks up and finds out what the rate is from Amarillo, and he goes to the index to look up Amarillo, and he finds the reference then to Amarillo, and he looks for his destination. He wants the rate from Amarillo to Pocatello or Idaho Falls, and he finds in section 2 these rates from Amarillo to Idaho Falls, and on page 50 of the tariff he finds Oregon Short Line points and the rates from Amarillo, and he finds the \$116.50 rate from Amarillo to Idaho Falls. Now, then, why should a shipper go farther in his effort to learn the rate, when he goes to that index and he finds Hereford listed as Item 98, and he goes to Item 98 and he finds that Hereford is included with Amarillo, and he goes to the index and finds that Amarillo is listed as giving a rate to Short Line points of \$116.50? Isn't that the end of it?

A. Well, I am not going to criticise the law, but the law, as you know, charges the shipper with the knowledge of the rates. Now, if he doesn't find those rates, want of knowledge on his part is no excuse.

Q. That is all?

A. And my interpretation of this tariff, after numerous years of experience, which is made condensed under the rules of the Interstate Commerce Commission, would not permit the application of that tariff as you wish it to be applied.

Court: Has the Interstate Commerce Commission ever construed that tariff? I mean, that tariff with the conditions imposed by those notes?

A. They have never criticised it, sir, to my knowledge. It was filed by Mr. Poteet as agent, and, as far as I know, it was accepted by the commission. We have attempted on some occasions to make a paragraph explain the application of a tariff, where wharfage and other terminal charges are involved, from numerous points all over the country, and frequently our tariffs have been returned for more detail or more definite information before the commission would accept them. Now, this tariff was published and filed with the commission in 1912, and of course I don't know—I didn't publish the tariff; whether Mr. Poteet ever received any criticism from the commission, I don't know. But I do know that, when we have to publish tariffs under certain prescribed forms, with a certain number of pages and index, and all the rest of it, we are often put to it to try and get it in as condensed form as possible, making it as explicit as possible, and yet as concise as possible; and that tariff, to my knowledge, has never been criticised. It may be.

Mr. Hart: Of course, that is not of importance anyway, whether it has or has not. This witness has nothing to do with its application or with its filing.

A. I don't think, though, that any experienced railroad man would pick up that tariff, in view of the blank space on page 57, routing, and construe it to apply.

Mr. Hart: That is argumentative.

Court: The thing I was trying to get at was whether or not this tariff has ever been brought before the Interstate Commerce Commission for the purpose of determining how to construe it.

Mr. Hart: Oh, I don't think so, your honor.

A. Oh, I don't think so.

Mr. Hart: As I said in my opening, the carriers themselves construed it our way for several years, because they collected the lower rate—\$116.50—did apply it from Hereford, and checked and rechecked it. It was only after a number of years had elapsed, and after these various checkings, that some one made this discovery which Mr. French has testified to. So that it is our claim that, as a practical matter, the practical construction given it by the railroads for years shows the application of this Amarillo rate to Hereford.

Court. Well, the application is very clear if there is no reference made to those notations that are made on page 56.

A. Page 57 on the chart.

Court: Yes, 56 and 57, the application of the rates. No. 350 and No. 360. If it were not for

those notes there, the application would seem to be very clear.

A. Yes. But, if your honor please, that is the only place—there is always a place in the tariff for the application, because there are so many rates, and so many roads parties to the tariff, that rates will apply to one line where they will not to another. Consequently a tariff cannot be taken on its face. It must be qualified with instructions or application. And under that application in the tariff, which is the first thing an experienced rate man looks at, you get a qualification of the rates there.

Mr. Hart: These tariffs are not to be made up by rate experts, I want your honor to understand. They are intended to be made up for the benefit of the shipper, and the Commission has repeatedly said they must be clear, they must not be ambiguous, and if there is any ambiguity it is to be construed in favor of the shipper. But I don't want to get into an argument of the case now, and that is what we have really been doing. I want to reserve that till later. That is all my questions with Mr. French.

#### Redirect Examination.

Q. Mr. French, did I understand you to say there were through rates named in this tariff from Amarillo in connection with the P. & N. T.?



A. There is a through rate, Mr. Robbins, named from Amarillo to points on the O. S. L., yes.

Q. In connection with the P. & N. T.?

A. In connection with the P. & N. T., yes, sir. Well, Amarillo was on the Pecos & Northern Texas.

Q. It is also on the Fort Worth & Denver City, isn't it?

A. Yes; but the question asked was, was there a through rate from Amarillo to points on our line? Well, Amarillo is on the Pecos & Northern Texas Railroad just as much as it is on the Fort Worth & Denver City, and there is a through rate there under the tariff. There is nothing to that point.

Q. Well, I am asking you, if you are testifying there is a through rate from Amarillo in connection with P. & N. T. business?

A. There is a through rate from Amarillo. At the time these shipments moved the through rate from Amarillo, which was a point on the Pecos & Northern Texas, was \$116.50, for example, to Pocatello. That plus the rate from Hereford or Abernathy to Amarillo made the through rate.

Q. Now, I am asking you if those through rates do not apply to Amarillo in connection with the Fort Worth & Denver City?

A. Yes, they apply in connection with Fort Worth & Denver City, the Colorado & Southern, and the Union Pacific, and the Oregon Short Line.



Court: Fort Worth & Denver City doesn't show a blank?

A. Well, that is the line north from Amarillo, your honor, which has since been—the old name of that line was—here is the Pecos & Northern Texas up here to Amarillo—then this was the Southern Kansas Railway of Texas at one time, but it has since been amalgamated into the Panhandle of Texas, the Santa Fe & Panhandle of Texas, because, I believe, the local laws of Texas require local names of railroads, or something to that effect. While the Fort Worth & Denver City is now, I think, the old Kansas, or Southern Railway of Kansas. I think that is the situation, but I am not exactly clear on that. But I don't quite know the point that counsel wished to make. Would you like this, judge? It shows, possibly, a little bit of the situation.

Court: Do you want this marked?

Mr. Robbins: No, I am not particular about marking that.

Court: It may be marked.

Mr. Robbins: If your honor wants it, we will offer it.

Court: Yes, well, let it be offered.

Marked "Plaintiff's Exhibit 3."

Excused.

Mr. Hart: I would like to put Mr. Lothrop on tonight, if I could.

Mr. Robbins: I couldn't very well assent to that, your honor.

Court: Very well, if you object to it, we will adjourn until tomorrow morning.

Adjourned until 10 A. M.

Portland, Oregon, April 17, 1917.

George F. Anderson, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Robbins:

Q. Your name is George F. Anderson?

A. Yes, sir.

Q. What is your business?

A. Traffic manager of the Union Meat Company, North Portland.

Q. Have you any connection with either one of the defendants in this case?

A. Why, I have in a way looked after the checking of their freight bills and freight matters.

Q. You act as traffic manager?

A. For both concerns.

Q. For both concerns?

A. Yes.

Q. You were so acting in 1912?

A. Yes, sir.

Q. Now, I will ask you if in 1912 you had any transactions in connection with these shipments which are in controversy here with the Short Line?

A. Not in 1912.

Q. Well, subsequent to that?

A. Subsequent to that time, yes.

Q. And what is the fact as to whether or not you filed a claim there for a refund on one of these shipments on the Loan case?

A. Involving the local rate from Idaho Falls down to Pocatello?

Q. Well, you did file a claim?

A. Of \$20 a car.

Q. You filed a claim in the Loan case?

A. Yes.

Q. How much was that claim you filed?

A. Well, there were two claims.

Q. Well, take one at a time—take the first one of January 30, 1915.

A. That involved 17 cars, was \$340, and we figured the interest for two years four months at six per cent, \$47.70, making a total of \$387.70.

Q. Now, have you got your reference there, your claim number?

A. Yes.

Q. Is that the Short Line's 8274-13-9?

A. Yes, sir.

Q. And that \$387.70, then, covered \$47.70 interest?

A. Yes, sir.

Q. Now, then, the other claim you speak of, is that carried under Short Line 8274-31-9?

A. Yes, sir.

Court: What is the date of that claim?

A. The date on the first one is January 30, 1915, and the second claim is February 5, 1915. That was approximately two years and a half after the shipment had moved.

Q. And how much was the amount of that, Mr. Anderson?

A. The amount of claim as presented was \$200 involving an overcharge on 10 cars, and with interest for two years four months at six per cent, \$28—total \$228.

Q. Now, you presented these claims on behalf of the Loan Co.?

A. Yes, sir.

Q. Acting as their agent?

A. Acting as their agent.

Q. You held a written assignment from them, I presume?

A. I did.

Q. Now, those claims were paid to you as agent for the Loan Company, were they?

A. Yes, sir.

Q. The document which you are referring to now is what?

A. That is O. S. L. voucher, payable in my favor as agent.

Q. And this covers the \$228 refund?

A. And this one is payable to me as agent, voucher O. S. L. for \$387.70.

Q. And those are the two refunds you have been describing?

A. Yes, sir.

Mr. Robbins: We offer these two vouchers in evidence, your honor.

Received without objection, and marked "Plaintiff's Ex. 4," and "Plaintiff's Ex. 5."

Cross Examination.

Questions by Mr. Hart:

Q. Mr. Anderson, your first connection with these transactions, you say, was several years after the shipments?

A. Yes.

Q. You were asked by the Portland Cattle Loan Company to check over its freight bills, and see whether or not any errors had occurred?

A. Yes, sir.



Q. And you were doing that generally with shipments for the Portland Cattle Loan Company?

A. Yes, sir.

Q. And when you came to these shipments from Hereford, Texas, to Idaho and Montana points, you examined the expense bills and the tariffs to see whether or not the charges were correct, did you?

A. Yes, sir.

Q. You had had some experience yourself in tariff matters, had you not?

A. Yes, I had been employed as rate clerk for the C. B. & Q. Railroad for six years. Subsequent to that time I was twelve years as traffic manager for Swift & Company at South St. Joseph and Fort Worth, Texas, and eight and one-half years with the Union Meat Company as traffic manager at North Portland, and had made a specialty of live stock rates and tariffs.

Q. Altogether you have had about 26 years in traffic work?

A. Altogether, yes.

Q. And for most of that time you have been dealing with railroad tariffs applicable to live stock shipments?

A. Particularly so with reference, when I came to Portland, to adjust the live stock rate situation here. I had to go over the situation with all the lines and adjust the rates to North Portland as

compared to other centers, such as Puget Sound, and other interior points.

Q. That is, you had charge of the general rate adjustment following upon the establishment of stock yards and plant?

A. And a revision of the tariff with the railroad.

Q. I mean, consequent upon the establishment of the industries out there at North Portland?

A. Yes.

Q. So that, at the present time, you have charge of all traffic matters for the Union Meat Company?

A. Yes, sir.

Q. And did at the time of these shipments?

A. Yes, sir.

Q. Were you dealing daily with tariffs then?

A. Yes, sir.

Q. Now, in going over these freight and expense bills for the Cattle Loan Company, did you have occasion to examine the tariffs applicable to the shipments?

A. Of these particular shipments?

Q. Yes.

A. I did.

Mr. Robbins: Well, now, if the court please, we have no objection to counsel going into that, but we want it understood he is making this wit-

ness his own. We didn't ask him anything about the application of the tariffs on direct examination. We asked him about these payments.

Mr. Hart: Well, ultimately, I shall make Mr. Anderson my witness, no doubt; but thus far I am dealing strictly with matters which appear to be brought out on the direct examination; that is, these refunds. The direct examination went to the refunds, and I propose to find out all of the circumstances surrounding the making of the claim for refunds.

Court: Did you go into these rates for the refund?

A. I did, your honor.

Q. I show you Plaintiff's Exhibit 1, Mr. Anderson, which states that it is "Joint Live Stock Tariff No. 100-A," and ask you if you examined that tariff in connection with these proposed refund claims of the Cattle Loan Company?

A. I did. I had a copy of this particular tariff in my possession at the time.

Q. And then, as a result of your examination of that tariff, what did you conclude as to the rates which were applicable?

A. The rates according to this tariff, as being applicable from Hereford, Texas, to Pocatello—the rates according to the tariff, as I read them, were applicable from Hereford, Texas, to Idaho Falls at the rate of \$116.50 per car.

Q. That is, you concluded that the Amarillo rate was clearly applicable from Hereford?

A. Absolutely.

Q. Now, then, what criticism did you have about the rates which had been charged the Cattle Loan Company for that shipment?

Mr. Robbins: Well, now, we renew our objection. We did not go into the accuracy of these rates with this witness at all. We merely asked him on direct if he got these refunds and he said he did.

Court: Counsel is trying to get at how he reckons his refunds—how the witness estimated his refunds. Of course, he had to have the tariff rate before him.

Mr. Robbins: I have no objection to his going into that if he makes him his own witness and lets me cross-examine him.

Court: If he is going to examine him as an expert, he probably will.

Mr. Hart: No, your honor, I may do that later, but I am still getting at the basis of this refund, because I do not want any impression created that Mr. Anderson in making these claims criticised any part of the rate except the Idaho Falls-Pocatello proposition.

Court: Very well, the court will hear you. I will overrule the objection.

Q. The question was, what criticism you did find with reference to the rates exacted?

A. Well, if it pleases the court, I will read a communication that I addressed to the freight claim agent of the Oregon Short Line in connection with the first claim.

Q. Well, perhaps counsel would not permit that. You can just tell what you did. What did you find with reference to the tariff?

A. I found that there was an overcharge of \$20 per car in the rate between Idaho Falls and Pocatello. In other words, the railroad had assessed the \$116.50 per car rate to Idaho Falls and assessed the local back from Idaho Falls to Pocatello; while, as a matter of fact, the intermediate application of the tariff provided that the Hereford-Pocatello rate should not exceed the Hereford-Idaho Falls rate.

Q. I see. Idaho Falls is a little—is farther west?

A. To the north.

Q. Farther to the north than Pocatello?

A. It is on the main line of the Salt Lake-Butte line of the O. S. L.

Q. So that, under the intermediate application on the long and short haul clause, they could not charge more for Pocatello than they did for Idaho Falls?



A. No, not according to the application of this tariff, although their freight claim agent contended that they could. I personally addressed a communication to the general freight agent, who has charge of the issuing of all the tariffs, and after addressing him personally on the subject, he sustained our position.

Q. Oh, I see—the freight claim agent first insisted that the \$20 charge for Idaho Falls-Pocatello was proper?

A. Absolutely.

Q. And then the general freight agent personally overruled him?

A. Overruled him; because the general freight agent is the one who construes or reads the tariffs as they are supposed to be read.

Q. So that then the allowance of this refund was made to you?

A. Yes, sir.

Q. And by what department was it paid?

A. I didn't understand the question.

Q. Was it paid by the auditor of the Short Line?

A. By the freight claim agent. He then received instructions from Mr. Reeves to voucher the two claims.

Q. Mr. Reeves is the general freight agent?

A. Mr. Reeves is the general freight agent of the Oregon Short Line.

Q. So that since that time, since 1915, has there ever been any suggestion that that refund was not entirely proper?

A. Until the application was made to their auditor.

Q. Well, this present application, and this law suit which grew out of it, did not criticise the Idaho Falls-Pocatello position that you had taken, did it?

A. No, not a bit.

Q. This case and the claims on which it rests deal with the Hereford-Amarillo situation?

A. Entirely. This claim here, it is not considered it enters into it at all.

Q. In other words, every one is agreed that the tariffs permit the same rate to Pocatello as to Idaho Falls?

A. Yes.

Court: That is to say, you didn't look into that matter—you took that for granted as being the rate from Hereford to Pocatello?

A. No, I figured, your honor, that the rate from Hereford, Texas, according to the tariff to Pocatello and Idaho Falls is the same—\$116.50; but the Short Line had assessed \$116.50 to Idaho Falls and charged us the local back to Pocatello.

Court: Well, now, the only question that arose

on the refund, was whether or not they had a right to charge the rate back?

A. Yes, that was what entered into this claim.

Court: That amounted to \$20?

A. Yes, sir.

Court: That is what you looked into especially?

A. Well, I looked into both the revising of the bill and the overcharge that had been made at the same time.

Q. That is, you checked up the whole rate?

A. Yes.

Q. At both ends of the trip?

A. Yes.

Q. And you satisfied yourself that according to that tariff Hereford shipments took the same rate as Amarillo shipments?

A. Yes, being in the Amarillo group, and according to the application.

#### Redirect Examination.

Q. Now, as a matter of fact, Mr. Anderson, the whole controversy in this case, with you and the freight claim agent and everybody else, was whether or not the rate applied from Hereford to Idaho Falls, wasn't it?

A. No, as I say, Mr. Robbins, we were checking our expense bills to the ultimate destination of the live stock; and according to the tariff I found that

the \$116.50 rate applied from Hereford in the Amarillo group to Pocatello and to Idaho Falls therefore I discovered there was an overcharge of \$20 per car, and I addressed a letter to Mr. McNitt of the Short Line, calling his attention to the mistake that had been made in assessing the local back from Idaho Falls to Pocatello; and his reply was that there was no through rate published to Pocatello.

Q. From where?

A. From Hereford to Pocatello. We are saying from Hereford to Pocatello.

Mr. Hart: Or from Amarillo to Pocatello?

A. Or from Amarillo to Pocatello.

Mr. Hart: The point was whether Pocatello or Idaho Falls was the destination.

Q. So we went back at Mr. McNitt and referred him to the application of the tariff, and still he didn't concur with reference to the local rate of \$20. Then I addressed a communication to the general freight agent under personal cover—Mr. J. A. Reeves—and he came back and sustained our position that the through rate from Hereford, Texas, to either Pocatello or Idaho Falls was \$116.50.

Q. You just point out in the tariff where you get the through rate of \$116.50 from Hereford, will you, please?

A. By referring to page 26, section 1, we find under index 98 the town of Hereford at the Ama-

arillo basis charge. The Amarillo basis I think was described yesterday. To make it a little more clear now, you take such points as St. Louis common points and Missouri River common points embrace a lot of common points in a certain territory.

Mr. Hart: By common points what do you mean—points that take the same rate?

A. Points that take the same rate. We will say St. Louis common point rate from Quincy, rate from Davenport, Moline, East St. Louis, are all in that group, although they are a considerable distance apart, from the basing point they take the same rate. Consequently, according to this tariff Hereford is subject to the Amarillo rate. Then by referring to page 50 of section 2, item 2950, we find the rate in lots of 10 or more cars—both of these shipments consisted of lots of ten or more cars—\$116.50 per car.

Mr. Hart: From and to where?

A. From Hereford, in the Amarillo group, to Idaho Falls, Idaho.

Q. Now, that is the basis of your computation, is it?

A. That is the basis of the rate.

Q. And that is the reason you say the rate applies from Hereford to Idaho Falls?

A. Yes.

Q. Well, now, in reading a tariff, it is usual to



read the whole of the tariff, isn't it, and not just pick out one or two parts of it?

A. Well, you will find your application right there, as you open up to this index here.

Q. Well, now, what does that application say as to section 1? Doesn't it say here that "The differentials shown in Section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates as shown in Section No. 2 hereof, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69?"

A. That is with reference to where there is a differential. There is no differential to be added or to be deducted from that rate.

Q. Well, now, wait a moment. That means this statement here that you are reading on page 25 can only apply where the routing over here on page 56 and the application makes it so, doesn't it?

A. Where there is a differential.

Q. All right. What does the next one say, then? The next one says that, where there is no differential, "the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated," in section 2.

A. There is no foot-note or any clause in there that gives any reference to your application on the back of the tariff at all. So naturally—

Q. What does this mean here?

Mr. Hart: Let him finish.

A. Wait till I get through. General Freight Agent Reeves and all the rest of the Short Line officials have passed upon it the same way.

Q. I am asking you what you think about it now; not what Reeves thinks about it.

A. Well, I have already stated what I think about it.

Q. Well, Mr. Anderson, this note, then; section 1, Item 200, on page 24, in your opinion, now, does that mean anything at all?

A. It means where there is a differential to be added or deducted.

Court: What is meant by a differential?

A. Well, in parts of that tariff—let me have that tariff so I can explain it to the judge a little farther. Here, your honor, these added differentials are to be added to the rates to apply through—like from Texico, New Mexico, would add \$2.75 over the Amarillo rate. Here are some that are to be deducted from the El Paso and Deming rate. Now, we turn to this one here, where Hereford is, you see there is no differential at all. Now, here is one above there, from Angeles, Texas, we add \$25 to the Amarillo rate.

Q. Well, now, you say you find no differential in the Hereford rate. Now, what does this second

note here mean, then? It says, "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated." What do you say that means?

A. Well, that means just what it says, where section 2 names the rates.

Q. Well, I presumed it did, but I thought you could explain it probably; you are qualifying as a rate man.

Mr. Hart: Are you cross-examining him now as my witness?

Mr. Robbins: I am trying to cover some of the grounds that you covered—whatever you call that.

Mr. Hart: Well, then, when you are through I will just keep him on and ask him all the questions I have to ask him.

Mr. Robbins: Have you an objection in here?

Mr. Hart: I think I will make no objection. Go right ahead, Mr. Robbins.

Q. By referring to section 2, Mr. Anderson, doesn't that show that the rates shown in No. 2, in columns headed Amarillo and El Paso, are to be applied from stations shown in section No. 1 where application and routing is provided on page 56?

A. That refers to where the differential is added or deducted.

Q. Yes. Now, can you point out on page 56

where there is any application or routing from any points on the P. & N. T.? Can you show that?

A. Does it make any specific reference in the note here as to the application? Here is your application.

Q. Will you answer my question, please, and then I will take the stand if you like?

A. Well, I am taking the tariff as it reads.

Q. I am asking you if you can point out any application or routing on page 57 from P. & N. T. points to O. S. L. points?

A. Here is your application and the rates. You are referring to something back that refers to some foreign line matters.

Q. Will you answer my question, if you please, Mr. Anderson?

A. I think I fully answered your question.

Q. Can you point out on page 57 any application or routing from P. & N. T. points to O. S. L. points?

A. I have answered your question. This paragraph here, 2, governs.

Q. Paragraph 2, "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in section No. 2 are to be applied as indicated." Now, just show us what section 2 is indicated from?

A. Section 2 is right here, page 50.

Q. That shows the Idaho Falls rate of \$116.50?

A. Yes.

Q. Well, now, turning back to page 32, doesn't item 205 say that those rates can only be applied where the application and routing is provided on pages 56 to 69?

A. That has reference to the differential basis.

Mr. Robbins: That is all.

Examination by Mr. Hart.

Q. Mr. Anderson, it was 1915—January, 1915, when you discovered this overcharge by reason of the Pocatello-Idaho Falls local?

A. Yes, sir.

Q. And how long afterwards was it that you got the refund, just approximately?

A. Well, it was probably sixty days after that time.

Q. Sixty days afterwards. And you said in your examination a moment ago—

Mr. Robbins: Pardon me. This is the date here.

Mr. Hart: He said approximately. These vouchers show January 30, 1915, and February 17, 1915. Those would be the correct dates?

A. Yes, those would be the correct dates.

Q. Now, when Mr. Reeves answered you and told you that he had instructed Mr. McNitt, the freight claim agent, to allow you a refund, did he say that he agreed with your statement of the rates?



Mr. Robbins: Well, if the court please, I don't think that is very material what Mr. Reeves said about it. The question is, what is the tariff rate here?

Mr. Hart: It is very material to show that it is a fact that the general freight agent of the Oregon Short Line Company construed this tariff as the defendants and Mr. Anderson construed it, to-wit, as applying the \$116.50 Amarillo rate from Hereford.

Court: That would be hearsay, wouldn't it, so far as Mr. McNitt is concerned?

Mr. Hart: Well, I am asking him what Mr. Reeves said to him, the general freight agent of the Oregon Short Line, the plaintiff company.

Court: Said to the witness?

Mr. Hart: Yes, said to the witness by letter or statement.

Mr. Robbins: I don't see how that would be material. You might get a dozen men that would say the rate was \$116, or \$110. I don't see that that would make any difference,—to permit this man to testify to purely hearsay.

Mr. Hart: It seems to me we have a right to show what practical construction the carriers have placed on this tariff. It appears already in evidence that for two and a half years the tariff was apparently construed as we claim it should be con-

strued, and that a refund was paid which recognized that construction; and that is the only point to this question.

Court: I think that is generally admitted, isn't it?

Mr. Robbins: We admit we made a mistake, yes. We admit we made a mistake in reading the tariff.

Mr. Hart: The point is they didn't make any mistake so far as Hereford and Amarillo were concerned. We want to show their construction of it.

Court: That is the very gist of the controversy, as to whether they did make a mistake or not.

Mr. Hart: Yes, and of course it is material to know how those men viewed the tariffs—the men who built the tariffs and who are responsible for their construction.

Court: I understand that it is admitted here that for those two years and a half they did construe the tariff as you say it ought to be construed now.

Mr. Hart: Yes.

Court: And after that they discovered their error. The question is whether or not they were in error, or whether or not they were construing it properly.

Mr. Hart: Yes. Well, I will withdraw that

question and put it in another form that perhaps will not be objectionable.

Q. Mr. Reeves did direct a refund, which refund of necessity recognized the application of the Amarillo rate from Hereford, did he not?

A. Of \$116.50 from Hereford to Pocatello.

Q. Yes. Now, then, when did the Cattle Loan Company first know that there was any claim that the Hereford rate—that it was necessary to collect the local rate from Hereford to Amarillo?

A. Well, to begin with, the Short Line instead of presenting expense bills, their treasurer drew a draft on the Portland Cattle Loan Company for \$7,693.25, involving the charges on all the shipments represented here in this case. They simply attached a memorandum. There was no expense bill submitted. About two years after, the Portland Cattle Loan Company obtained copies of these expense bills from the railroad; and it was then about three months after that that the claims involving these overcharges were presented.

Q. What I was getting at was, whether or not, during the time you were corresponding about the Idaho overcharge, there was any statement made in any of that correspondence about any claimed error about the Hereford-Amarillo rate?

A. None whatever.

Q. None whatever. Was it afterwards that a

claim was made that the Hereford-Amarillo rate had to be collected?

A. Yes.

Q. Now, there is a through route stated in this tariff from Amarillo to the Idaho points?

A. Yes, sir.

Q. To Oregon Short Line points. And there is in the tariff also a specific through rate of \$116.50 in ten car lots from Amarillo to Oregon Short Line points?

A. Yes.

Q. And Amarillo is on the Pecos and Northern Texas as well as on other lines, is it not?

A. It is on the Pecos & Northern Texas.

Q. And on other lines, too, Amarillo is?

A. Amarillo, yes. Amarillo is the junction point there between that line and Fort Worth and Denver City.

Q. And there is a specific statement in this tariff, section 1, to the effect that Hereford takes the same rate as Amarillo?

A. Yes, sir.

Q. And there is also a statement in the tariff that if Hereford—which means that if Hereford did not take the same rate as Amarillo, but if there was a differential, something added to or deducted from the Amarillo rate, that differential could only

be used where there was a routing shown at the back of the tariff?

A. Otherwise it would take the local rate.

Q. The point there being that if there was no routing shown on page 56 of the tariff, they would have to use the local from Hereford to Amarillo?

A. Yes, sir.

Q. If there was a routing shown, then they could use this differential of two, three, five, or ten dollars above or below the Amarillo rate?

A. Yes.

Q. That is true. And in the same explanation of section 1 of the tariff, there is a statement that where there is no differential, that is where the station, the point of origin, takes the same rate as Amarillo, the base point—in a case of that kind, the explanation of the tariff is flatly that the rates shown in section 2 are to be applied?

A. Yes, sir.

Q. And that rate in section 2 from the Amarillo group to Idaho Falls and Pocatello and such points, is \$116.50?

A. Yes, sir.

Q. And that was your basis for construing this tariff as applying the Amarillo rate for \$116.50 from Hereford?

A. And was confirmed by the general freight agent of the Short Line as the correct tariff rate.



Q. That is, it was confirmed when he recognized your overcharge claim?

A. Yes, sir.

Court: Who is the general freight agent?

A. J. A. Reeves.

Q. Do you remember, Mr. Anderson, when you presented your overcharge claim, giving him a specific reference to this live stock tariff?

A. I did, to those particular items.

Q. Which go to the rate all the way from Hereford up? If you have your letter to Mr. Reeves, I wish you would produce it or a copy of it.

A. If it please the court, I will read the first communication.

Mr. Hart: Well, if Mr. Robbins has no objection. That is not strictly the way to do it.

Mr. Robbins: What is the date of it?

Mr. Hart: It is first the copy of his letter to Mr. McNitt of November 11, 1914, and Mr. McNitt's answer of December 17, 1914, and then Mr. Anderson's personal letter to Mr. Reeves of December 23, 1914.

Mr. Robbins: I have no particular objection if the court wants to hear it, but I don't know what it has got to do with the case. We admit we made a mistake in assessing the rate, but if the court wants to hear it I will raise no objection.

Mr. Hart: The only point, your honor, is to

show that Mr. Anderson referred Mr. Reeves in this letter to the particular tariff we are talking about now, so that Mr. Reeves and his associate office had every opportunity for determining whether or not the \$116.50 was the correct rate from Hereford to Pocatello.

Court: After all, that would be hearsay, wouldn't it?

Mr. Hart: Well, it is an admission really. It is an admission against interest of the plaintiff in this case.

Mr. Robbins: If the court please, I cannot follow counsel on that. Now, if it were someone that had not been trying these cases, I could understand it; but here is a man that thoroughly understands we are bound to assess and collect the tariff rate, and it doesn't make a particle of difference what the agent said or what Reeves said or what anybody else said or thought. He knows better than that. It doesn't make that much difference what those people said or thought about it. The question is, what is the tariff rate here?

Mr. Hart: Mr. Robbins doesn't understand the position we take in this case, and that is: Here is a tariff which confessedly is ambiguous; that is, as the evidence now shows, it has been read two ways. We claim it should be read one way, and they have admitted reading it that way for a number of years. Now, then, what is the court going

to do? The court has got to determine what is the correct rate—has got to determine whether or not the tariff was ambiguous—whether or not it can be read in two ways; if not indeed in the one way that we see.

Court: The fact is here that Mr. Reeves agreed with the witness on the stand as to that tariff.

Mr. Hart: That is the ultimate effect of this testimony, yes. And we want it clearly understood that Mr. Reeves was referred particularly to this tariff so that there can be no mistake. There could have been no mistake about his examining the tariff and construing it that way.

Court: I will permit you to read that correspondence. However, I think it is more in the nature of hearsay than it is direct testimony. Reeves would be the best witness here.

Mr. Hart: That is true. Of course Reeves is an officer of the plaintiff company.

Q. Just read those three letters then, your first letter to Mr. McNitt, his reply, and your letter to Mr. Reeves.

A. This letter is dated November 11, 1914. "Mr. A. R. McNitt, Auditor, Oregon Short Line Railroad Co., Salt Lake City, Utah. Dear Sir: Referring to Hereford, Texas, to Pocatello, Idaho, waybills 543 to 559 inclusive, September 28 1912 covering shipment of 17 cars of cattle shipped for the account of

the Portland Cattle Loan Company of North Portland.

We note you have assessed freight charges on basis of rate of \$136.50 per car. Should not the charges have been assessed on basis of rate of \$116.50 as per item section 1, page 26, and item section 2, page 50, W. A. Poteet, Tariff 100-A, your No. 2271-B, permitting the application of the Hereford-Idaho Falls Rate?"

Mr. Hart: Let me interrupt you. Is that this Exhibit 1, that tariff you are referring to?

A. Yes, that is the same tariff.

(Continuing reading): "Your prompt reply will be appreciated. For your ready reference we are attaching copies of freight bills in question."

That was to their auditor who revises all the bills. His reply under date of December 17, 1914:

"With reference to your favor of November 11th, and returning herewith copies of freight bills sent with same.

We find the charges as assessed to be correct. We cannot use rate requested by you, on account of Item 5, of Tariff 2271-B ICC 265, effective Feb. 2d, 1912, which states that intermediate points must be located between two points shown in tariff or two destinations shown and there is no point shown south of Idaho Falls in section 2, of item covering rates and we have therefore used the best rate,

which is combination on Idaho Falls of \$116.50 per car plus \$20.00 Idaho Falls to Pocatello, this rating being in accordance with ICC Rulings."

In other words, he said there wasn't any rate in between the given points, like here is Idaho Falls, here is Pocatello—he contended there was not any point south. Then in my reply I wrote a personal letter to Mr. Reeves under date of December 23, 1914:

"Mr. J. A. Reeves, G. F. A., Oregon Short Line Railroad Company, Salt Lake City, Utah. Dear Sir: Your attention is directed to copies of letters exchanged with Mr. McNitt's office in regard to the proper rate to apply on shipments of cattle from Hereford, Texas, to Pocatello, Idaho, shipped Sept. 28, 1912, for the account of the Portland Cattle Loan Co. and the Portland Feeder Co.

It seems as though this rate was based on the through rate of \$116.50 per 36 ft. 6 in. car from Hereford to Idaho Falls, plus \$20.00 Idaho Falls to Pocatello based upon the application of Item 5 of Tariff 2271-B ICC 265.

Our contention is that at the time this shipment moved there were rates published in this tariff both to Rock Springs and Idaho Falls both points of which are on a direct line entitling us to the intermediate rate applicable to the more distant of the two points of which Pocatello is directly intermediate.



Awaiting your further reply, we are, yours respectfully."

Then Mr. Reeves referred this back to the auditor. This is dated January 16, 1915. He says:

"I have your personal favor of the 23rd ult., addressed to Mr. J. A. Reeves, our general freight agent, in regard to alleged overcharge on shipment 17 cars of cattle Hereford, Tex., to Pocatello, Idaho, Sept. 1912.

In my letter to you of Dec. 17th, I returned you the copies of freight bills sent with your letter of Nov. 11th. Will you kindly return these freight bills, and if you are not shown as consignor or consignee of these consignments, will you kindly have an assignment in your favor, or advise if we shall make draft payable to Portland Cattle Loan Co., in care of your firm, as we have authority from our general freight agent to protect the rate of \$116.50 per car as claimed. Yours truly, A. R. McNitt."

Q. Now, the \$116.50 was the Amarillo rate?

A. Through rate from Hereford to Pocatello which had been assessed to Idaho Falls with the local back.

Q. That \$116.50 rate is the rate stated from the Amarillo group to destination?

A. Yes.

Mr. Hart: That is all.

## Examination by Mr. Robbins.

Q. Well, now, Mr. Anderson, this first letter you are talking about here from McNitt, that was on December 17th?

A. That is, his reply was December 17th.

Q. Do you know that Mr. McNitt wrote that letter himself?

A. It is signed by Mr. McNitt. I couldn't say as to whether that is his.

Q. You don't know whether he wrote it or not?

A. There is very few of those traffic officers that really deal with the rate situation themselves. They leave it to their subordinates.

Q. That is the point I am getting at. So far as you know, that letter was written by some clerk down there?

A. I wouldn't say as to that, because if I addressed a personal letter to you, calling your personal attention to some discrepancy, it is more apt to go to somebody that will give it proper attention than it is to hand it to an office boy, or rate clerk that don't understand his position.

Q. I don't say office boy. The point I am making is, you don't know that McNitt wrote that letter?

A. That is his signature or his office signature.

Q. What do signatures signify in the left-hand corner there, or the initials I should say?

A. JAS.

Q. That is not McNitt's initials, is it?

A. I wouldn't say as to that. It might be the stenographer's initials. Quite frequently the stenographers put their initials on the corner.

Q. Does J stand for McNitt? There are two—"JAS-J."

Mr. Hart: I don't think there is any point to that.

Mr. Robbins: There is this much point about it. I would like to get this straight. You put it in over my objection.

Mr. Hart: Mr. McNitt or somebody authorized to write the letter.

Mr. Robbins: You are putting this in as an admission of Mr. McNitt.

Mr. Hart: Admission of the Short Line Company.

A. If you go back to the reply where the letter was referred to Mr. Reeves personally, the same party you refer to replies to the second communication. Now, he is apparently one in authority or he would not say "We will pay the claim based on the proper tariff rate."

Q. I am asking you about this first letter now, Mr. Anderson—this first letter of November 11. Did you send that to McNitt under personal cover, you say?

A. No, I addressed it to Mr. A. R. McNitt as auditor—not under personal cover.

Q. This answer you received of the 17th, you don't know whether it was signed by McNitt personally or not?

A. I couldn't say as to that.

Q. Now, then, what was the date of that second letter? That is December 23rd?

A. My letter of December 23rd addressed to J. A. Reeves personally.

Q. That went to Reeves under personal cover?

A. Personal cover.

Q. And that answer to that was on—

A. January 16th.

Q. On January 16th?

A. Signed by the same party as referred to in the letter that you referred to of December 17th?

Q. So that you don't know whether Reeves or McNitt answered either one of those or not?

A. It is signed by A. R. McNitt. Of course I didn't see him sign the letter.

Q. No. Now, you had considerable other correspondence there too, didn't you, with them in connection with this matter?

A. At what time?

Q. Following this—right along following this?

A. We had, I think, some correspondence with

them probably, when the cases were referred back through Mr. Wood's office.

Q. Now, didn't you receive a letter under date of April 30, 1915, from McNitt?

A. Have you a copy of it there?

Q. Yes. Haven't you got them there?

Mr. Hart: They are probably in my files, Mr. Robbins.

Mr. Robbins: Well, I have got them here right handy. That is, I couldn't swear it is a copy. It is marked "Copy."

Q. Did you get that letter, do you recall, or could you testify?

A. Excuse me just a minute.

Q. Certainly.

Mr. Hart: Let me see it?

Court: You say this is 1913?

Mr. Robbins: This follows right after that other correspondence.

A. This is 1915.

Mr. Hart: This is April 30, 1915, and this is the letter which evidently first makes the claim that the Hereford-Amarillo situation was wrong. No doubt we got that.

Court: He changed his mind.

Mr. Hart: He changed his mind between February and April. That is the point.



Q. Are you willing to say that that is a copy of the letter, that has been made by somebody—I don't know who? Do you recognize it?

A. I think there was such a letter in the file.

Q. Well, just read that letter to the court, will you?

Mr. Hart: Here is the original, Mr. Anderson. It is not pertinent, but I have no objection.

Mr. Robbins: Go ahead, read it.

A. It says: "Salt Lake City, Utah, April 30, 1915. Claim 8274-13-9. 8274-31-9. Mr. Geo. F. Anderson, Agent Union Meat Co., No. Portland, Ore. Dear Sir: On Jan. 30, 1915, under our voucher No. 0-14140, we paid you \$387.70, which amount included \$47.70, interest, on what we supposed was legitimate overcharge on shipment 17 cars cattle from Hereford, Tex., to Pocatello, Ida., moving Sept. 28, 1912.

"On Feb. 17, 1915, per our voucher 0-14411, we paid you \$228.00 of which \$28.00 was interest on 10 cars cattle between same points on same date.

"The above result was secured by using a rate of \$116.50 per car from Hereford, Tex., to Pocatello, Ida., and I regret to advise that we now find same to be in error and that the correct rate should be on combination of locals over Amarillo being \$26.40 for a 36-ft. car Hereford to Amarillo, as per Panhandle & Santa Fe Tfr. 6016-F, ICC-6769; and

\$116.50 for a 36-ft. car, Amarillo to Pocatello, Ida., per O. S. L. Tariff 2271-B, ICC-265. I am therefore compelled to request of you refund of the amounts paid you in error, totaling \$615.70.

"Will appreciate your prompt attention in this. Yours truly, A. R. McNitt."

Mr. Robbins: We offer this original letter in evidence, your honor, and ask that it be marked.

Mr. Hart: It has been read into the record.

Mr. Robbins: We will withdraw it. I don't want to break up his record, your honor.

Q. Now, you wrote another letter there to McNitt, on the 3d of May, didn't you, in connection with this same matter?

Mr. Hart: There is no point to this added correspondence.

Mr. Robbins: There is this much point—we want to explain it. He was so anxious to explain this situation—let us have it all.

Mr. Hart: These parties corresponded for an ensuing year or more, until suit was brought, one contending that the Hereford-Amarillo rate had to be charged and the other denying it.

Court: I think that is the trouble of getting into this correspondence at all.

Mr. Hart: I merely brought in the admission, in the first place, of the Oregon Short Line.

Court: Now, then, the attorney on the other

side is showing that they changed their mind, which is conceded.

Mr. Hart: They have shown that, and I made no objection to their showing it. But why should we go on now?

Mr. Robbins: Why should we start? That is the question in my mind.

Mr. Hart: We had a distinct purpose in starting.

Mr. Robbins: You contend they started. Now, you started; I have a right to show what transpired.

Court: What is the question now?

Mr. Robbins: I asked him if he didn't also write a letter to McNitt under date of May 3, 1915. I will withdraw that. There is no sense in this in the first place. That is all.

Examination by Mr. Hart.

Q. So that, Mr. Anderson, April 30, 1915, was the time when it was first suggested that the Hereford-Amarillo local rate had to be collected?

A. Yes.

Q. That was that letter of Mr. McNitt's of April 30, 1915, relating to the two shipments moving August and September, 1912?

A. Yes.

Q. And it was April 30, 1915, when this first suggestion—the suggestion was first made that it

was necessary to collect local from Hereford to Amarillo?

A. Yes.

Examination by Mr. Robbins.

Q. I notice here in the correspondence that you stated to Mr. McNitt that you intended to refer this whole matter to the Interstate Commerce Commission for a ruling. Did you ever do that?

A. We couldn't—you couldn't refer it to the Interstate Commerce Commission for a ruling, because they wouldn't recognize—they don't recognize the shippers.

Q. Well, beg your pardon, Mr. Anderson. I understood that you told Mr. McNitt you intended to do that?

Mr. Hart: That wouldn't make any difference anyway.

A. That wouldn't make any difference.

Mr. Robbins: Let me find out.

A. The Interstate Commerce Commission would not recognize anything of that kind. If you will allow me to explain that; where a shipper is overcharged, within the limitations of two years you cannot take it up with the commission.

Q. You didn't take it up with the commission?

A. I say you couldn't take it up with the commission.

Q. You said in your letter here you intended to?

A. Well, I intended to—sometimes you say that just as—

Q. As a bluff?

A. As a bluff, yes.

Mr. Robbins: That is all.

Examination by Mr. Hart.

Q. The Interstate Commerce Act provides a two-year limitation from the time of shipment, I understand?

A. Yes.

Q. So that, although the carrier may come in several years later and try to collect the under-charge, the shipper cannot ask reparation after two years from the time of shipment?

A. After two years.

Excused.

Court: So that rule doesn't act both ways, then?

Mr. Hart: No, that is the unfair part of it, and I suppose some time it will be rectified.

Mr. Robbins: If the court please, counsel tells me that Mr. Lothrop is still in as much of a hurry as he was last night. I think I would like to accommodate him if he wants to get away.

Court: Very well.



J. H. Lothrop, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Hart:

You are anxious to get through by noon here, Mr. Lothrop, I understand?

A. I am. I would like to get through.

Q. You are traffic manager of the Portland Traffic & Transportation Bureau, Mr. Lothrop?

A. Secretary.

Q. Secretary. And in charge of rate and traffic matters for that association?

A. Yes, sir.

Q. That association comprises jobbers and manufacturers in Portland?

A. Jobbers and manufacturers, distributors generally.

Q. How long have you been engaged in rate work?

A. Nearly thirty years.

Q. Where abouts, briefly?

A. I commenced to work for the Union Pacific at Omaha thirty years ago and remained with that company about twenty years, most of the time in the traffic department. After that I went to Spokane, was general freight agent of the Spokane & Inland—was with them about two years. I have

forgotten the exact time. Was out of the service for something less than a year. Was then with the North Coast Railroad. And then came to Portland five and a half years ago; became secretary of the traffic—manager at that time of the transportation committee of the Chamber of Commerce, which was afterwards merged with the Chamber of Commerce, and then separated a year ago under the present association.

Q. So that after this period of railroad experience, traffic experience for the railroads, after that and for the past five and a half years you have been representing this traffic bureau, or rather the Traffic and Transportation Association and its antecedent bureau?

A. Yes, sir.

Q. And your work in that respect has had to do with the construction of tariffs?

A. Well, not the construction of the tariff.

Q. I mean construing them. I don't mean making them.

A. Construing them, yes.

Q. Have you participated in many rate cases and many discussions of rates?

A. Quite a number.

Q. Before the Interstate Commerce Commission?

A. Yes, sir.

Q. You are engaged usually with Mr. J. N. Teal in the handling of rate work, are you not?

A. Yes, sir.

Q. Mr. Lothrop, have you examined this tariff, Joint Live Stock Tariff No. 100-A, W. A. Poteet Agent, which is plaintiff's Exhibit 1 in this case, at my request, to determine the rates stated therein on live stock in ten carload lots from Hereford, Texas, to Pocatello, or Idaho and Montana points generally, on the Oregon Short Line?

A. Yes, sir.

Q. What do you find as the rate quoted by that tariff 100-A?

A. In my opinion, the correct rate on cattle in 10-car lots from Hereford to Pocatello is \$116.50 per car.

Q. Now, I call your attention first to the manner in which that tariff is constructed. There is first section 1, is there not?

A. Yes.

Q. Now, tell what is section 1 of the tariff? What does it aim to do?

A. Section 1 of the tariff names the basis of rates from various points in the Southwest, stating whether the rates shall be from certain points the same as basing rates, or whether they shall be arbitraries above or differentials below those basing rates.

Q. That is, there are certain base points stated, and Amarillo is one of those base points?

A. Amarillo is given as one of the base points, yes, sir.

Q. And then there is a list of stations which either take the Amarillo rate, or which take something a little over or something a little under?

A. Yes, sir.

Q. And when it takes a little over you call it an arbitrary, and when it takes something under it is a differential, or is the word "differential" applied to both?

A. I think they use "differential" in both cases here. Sometimes where the addition is found, it is usually called an arbitrary; while below, or a deduction, it is frequently called a differential.

Q. But this tariff refers to both as differentials, that is, above or below the base point rate?

A. Yes, sir.

Q. What do you find in section 1 as to the station of Hereford, where these shipments originated?

A. Hereford is indexed as No. 98 on page 26 and takes the Amarillo rate basis. There is no addition or no deduction shown; no arbitrary or differential.

Q. But that is the section of the tariff showing points of origin?

A. Yes, sir.

Q. And the basis of rates from the points of origin?

A. Yes, sir.

Q. And you find there that Hereford takes the Amarillo rate?

A. Yes, sir.

Q. Now, where do you find the Amarillo rate?

A. The Amarillo rate is shown in section 2 of the tariff.

Q. Referring you to page 50 of section 2.

A. On page 50 the rate of \$116.50 is shown as applying from Amarillo to Idaho Falls on the Oregon Short Line. Pocatello is not specifically mentioned but is intermediate to Idaho Falls, and the Pocatello rate cannot exceed the Idaho Falls rate. Therefore the Idaho Falls rate applies at Pocatello.

Q. And does this tariff also show the same, or a rate from the Amarillo group to Dillon?

A. Dillon \$125.00, yes, sir.

Q. And Dillon is on the way up to Butte?

A. Yes, sir, north of Pocatello and south of Butte.

Q. So to get the Butte rate they would take the Amarillo group rate to Dillon and add the local to Butte?

A. I should think so, yes.



Q. Now, section 2 of this tariff undertakes to do what?

A. Well, section 2 of the tariff actually names rates to various destinations from certain groups.

Q. From these different groups?

A. From the different groups, yes, sir.

Q. All right. Now, turn back to section 1 of the tariff, which, as you explained, lists the points of origin, and states the rates from those points of origin. Do you find anywhere there any reference to section 3 of the tariff, where the routing and application of certain rates is shown—do you find any reference in section 1 to section 3 which would limit any of these rates stated in sections 1 and 2?

A. Yes, there is limitation on some of them.

Q. Now, what is that limitation?

A. That limitation or restriction is placed against stations, originating stations that take a differential.

Q. Originating stations, did you say?

A. Originating stations taking differential rates.

Q. Taking differential rates?

A. Differential above or below the base rate.

Q. And you find the limitation on page what of the tariff?

A. It is on page 24.

Q. And that reads how?

A. That reads "The differentials shown in section No. 1 are to be added to or deducted from the Amarillo, El Paso, or Deming rates as shown in section No. 2 hereof, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69."

Court: Just a moment.

A. That is on page 24, your honor.

Court: Now, you refer to page 57?

A. "Provided on pages 56 to 69," yes, sir. And 57 would come in under that grouping.

Q. Well, now, I want to ask you, on page 57, Pecos & Northern Texas Railway, following that out to the O. S. L., there is a blank left there?

A. Yes, sir.

Court: There is no rate given. How do you construe that?

Q. That applies, your honor, according to the reading of the tariffs, where differentials are shown in section No. 1.

Q. That is, Mr. Lothrop if I understand you correctly,—suppose Hereford was shown in section 1 as taking a differential of \$2.50 over Amarillo, supposing, just for the purpose of illustration, that instead of showing Hereford to be in the Amarillo group and taking the same rate, Hereford was shown as \$2.50 above the Amarillo rate, as some stations are so shown in section 1—

A. Yes, sir.

Q. Now, there would be that differential, so called, of \$2.50?

A. Yes.

Q. Now, then, under this explanation, you go back to page 57, and finding no route number with the Oregon Short Line, it would mean that you could not use that \$2.50 over Amarillo but would have to charge the local—have to pay the local rate from Hereford to Amarillo?

A. Yes, sir.

Q. That is correct, is it? But that is the case where the tariff showed a differential, an added charge over or a deduction from the Amarillo rate?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. And where, on the other hand, the tariff shows the Hereford rate and the Amarillo rate to be the same, that is, where there is no differential, do you find then any reference to page 56 or 57 of the tariff, which might make that application of the Amarillo rate improper?

A. No, sir.

Q. What is the explanation which covers cases where the rate is the same, as in the case of Hereford and Amarillo?

A. That is provided for in the second paragraph

of page 24, which reads, "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in section No. 2 are to be applied as indicated." That is entirely separate and distinct from paragraph No. 1 shown on page 24. It positively fixes the rates from Hereford to be the same as the rate from Amarillo. If it had been intended to refer to pages 56 to 69, or to 57, as that chart is given on, they should have been included in the second paragraph, or the one where it reads to start with, "Where no differentials are shown." There should have been included in that paragraph the same reference to those pages in section 3 as are covered in the first paragraph of page 24. There is a positive statement there as to the Hereford rate being the same as the Amarillo without any restriction or any qualification.

Q. So that, according to those two explanations on page 24, originating points which take a slightly higher or lower rate than the Amarillo rate can only be given that slightly higher or lower rate where there is a route number shown on page 57 of the tariff?

A. Yes, sir.

Q. But on the contrary, where there is no differential, where the tariff shows the Hereford rate the same as the Amarillo rate, there is no differential, then the explanation on page 24 makes no reference to the chart, or to the routing at pages 56

to 69, and there is no such limitation as to that application as there is to the case where a differential appears?

A. Yes, sir.

Q. So that, in your judgment, as a rate expert, the meaning of that tariff taken as a whole, taking sections 1 and 2, with the explanations given in it, the meaning of that tariff is to quote a rate of \$116.50, the Amarillo rate, from Hereford?

A. Yes, sir.

#### Cross Examination.

#### Questions by Mr. Robbins:

Now, Mr. Lothrop, as I understand your testimony, you are testifying that Item 200 there, under section 1, only applies where there are no differentials? Is that correct?

A. No. Page 24 refers to both where there are differentials and where there are no differentials.

Q. The first part I am talking about now.

A. The first part?

Q. The first part of Item 200 there. Yes, the first paragraph there.

A. I understand.

Q. I understand you to testify that that only applies in cases where there are no differentials?

A. That is just what it says, sir.

Q. That is your testimony?



A. Yes, sir.

Q. And where there are no differentials named, then you construe the tariff as meaning that Hereford would take the Amarillo rate?

A. Absolutely so. There is no restriction whatever—no further reference. It says positively, "Where no differentials are shown, the Amarillo rates, as shown in section No. 2, are to be applied as indicated."

Q. Yes. Well, now, Abernathy takes a differential over Amarillo, doesn't it?

A. Yes, sir. Abernathy takes a differential of \$8.80.

Q. \$8.80 over Amarillo?

A. Yes, sir.

Q. Now, what would be the rate, then, according to your construction of the tariff, from Abernathy to Pocatello?

A. From Abernathy it would be a combination on Amarillo.

Q. It would be a combination on Amarillo?

A. Yes, sir.

Court: \$8.80 would be added to the \$116.50?

A. No, the local rate from Abernathy to Amarillo would be added to the \$116.50.

Q. That would be the local of \$39.60, then, added to the \$116.50?

A. I don't know what the local is; whatever the local rate is.

Q. Well, it is \$39.60, some of the witnesses testified. So that would make the through rate from Abernathy, then, \$156.10, or whatever the local added to the \$116.50 would make?

A. Yes, sir.

Q. Well, why do you make that rate on a combination over Amarillo?

A. Because there is a differential applied from Abernathy.

Q. What is your authority for that in the tariff?

A. There is a differential of \$8.80 is found against the index.

Q. I know. But the rule, Mr. Lothrop?

A. That is the first paragraph on page 24, section No. 1, which provides for differentials, where it says where the differentials are shown. Then you are further referred to the applications provided on pages 56 to 69. I think page 57 is the particular page that you would refer to.

Q. Yes, that is where the chart is.

A. Yes, sir.

Q. Well, now, there is no differential shown for Hereford, you say?

A. No, sir.

Q. Well, now, what does the second paragraph of Item 200 refer to? What does that mean?

A. It means just what it says, I presume.

Q. Well, we thought so, but we don't seem to be reaching the same conclusion. I want your theory as to what it means.

Mr. Hart: You mean you thought so for the first two years.

Mr. Robbins: Oh, no, no. We are not like these traffic men—we admit we make mistakes sometimes, Mr. Hart, try to get them right.

Q. What construction do you place on the second paragraph of Item 200 there?

A. Just what is previously stated; Mr. Robbins, that the Amarillo rate applies from Hereford.

Q. The Amarillo rate applies from Hereford?

A. Yes, sir; just as it says, just as plain as language can be written, it seems to me: "Where no differentials are shown, the Amarillo rates as shown in section No. 2 are to be applied as indicated."

Q. Well, now, how are they indicated in section 2?

A. Section 2 shows right there, \$116.50.

Q. No, the note I mean—the note to section 2?

A. You refer to Item 205?

Q. Yes, the part that is underlined in pencil there by somebody.

A. On page 32. Do you want me to read it?

Q. No, just the application part of it—the application and routing?

A. Well, it is pretty hard to separate it. “The rates shown in section No. 2, in columns headed ‘Amarillo’ and ‘El Paso-Deming,’ are to be applied from stations shown in section No. 1, as taking Amarillo or El Paso-Deming rate basis, or same are to be used as a basis for arriving at through rates from stations shown in section No. 1 as taking differentials over or under Amarillo or El Paso-Deming rates, where application and routing is provided on pages 56 to 69 inclusive from such point of origin to the destination station.” “See also Item 200, page 24.”

Q. That is referring us right back to where we started from?

A. Yes sir.

Q. Well, now then, Hereford is located on the P. & N. T., isn't it?

A. Yes sir.

Q. How do you construe any authority under the note to section 1 or section 2 to make a through rate on the P. & N. T., in view of the chart on page 57?

A. I think that the reference, the further reference under that paragraph, “See also Item 200, page 24,” you are referred right to that, and it shows there absolutely, plain as language can be written,

that where no differentials are shown the Amarillo rate as shown in section 2 is to be applied.

Q. Yes, in those cases where there is a through routing provided on page 57?

A. In other words, that absolutely nullifies Item 205 shown on page 32, just as section 3, page 57, absolutely prohibits the application of the Amarillo rate from Hereford under paragraph 1 of section 1.

Q. That note to section 1 and the note to section 2 in effect just refer back and forth, and both of them depend on page 57 for their routing and application, don't they?

A. No. After reading section 2 you are referred right back to section 1.

Q. That is what I am trying to say, yes.

A. In other words, I think section 2 would govern. Well, I don't know whether it would govern or not—it would be very conflicting if section 2 did not provide that reference to Item 200 on page 24. But after it does refer you back to that, and it states positively just what rates should be applied, it seems to me section No. 2 is without force so far as the Hereford rate is concerned, where no differential is shown.

Q. We are agreed, however, that on page 57 there is no through routing shown from P. & N. T. points to O. S. L. points; aren't we?

A. Yes.



## Redirect Examination.

Q. There is a through routing shown from Amarillo to Idaho points, is there not, Mr. Lothrop?

A. Yes.

Q. Amarillo is a P. & N. T. point?

A. It is the northern terminus, I think. I am not sure about that.

Q. The northern terminus of the Pecos & Northern Texas. So that the chart is not strictly accurate in saying there is not any through routing from any P. & N. T. point to any O. S. L. point?

A. That is correct, sir.

Q. Whatever the note to section 2 says, you are referred back to the note to section 1, which makes the positive statement that in cases where there are no differentials over or under the basing point, then the flat basing point rate is to be applied?

A. Positive statement written just as plainly as it could be written in the English language.

## Recross Examination.

Q. Well, now, as a traffic man, Mr. Lothrop, where the chart says there is no through rate from P. & N. T. points to O. S. L. points, do you still construe Amarillo as being a P. & N. T. point, simply because it is a junction—from a traffic standpoint, now?

A. Well, I don't know how you can get away

from it. If the P. & N. T. runs into Amarillo, it must certainly be a P. & N. T. point.

Q. Well, now, might not the Fort Worth & Denver City have their own switch track there in Amarillo?

A. Yes. It might be also a Fort Worth & Denver City point.

Q. That is what I thought I said, Fort Worth & Denver City. So, from a traffic standpoint, in view of the chart there, you construe Amarillo as being a P. & N. T. point?

A. I don't know about the chart part of it. Amarillo is a P. & N. T. point, if that is what you mean.

Mr. Robbins: That is all.

#### Redirect Examination.

Q. Is there any reason why a shipper, or anyone else, seeking to find out what the rate from Hereford to Idaho points might be—is there any reason, so far as you can find, why he might not rest content with what is shown in sections 1 and 2 of that tariff, without going to a section 3?

A. I see no reason why he should go to section 3 after reading that paragraph in section 1. That absolutely fixes the Amarillo rate from Hereford—the same rate from Hereford as from Amarillo. I don't know why he should go any farther. If there had been any intent on the part of the carriers to have you refer to section 3, it should have been so

stated in the second paragraph, page 24, of section No. 1, exactly the same as was stated in the first paragraph.

Q. That is, in the paragraph about differentials?

A. Yes.

Q. Which governs as in case of stations like Abernathy, where there is a differential shown?

A. Yes.

Q. To stations where there are no differentials?

A. You are referred to that particular part of section 3, and if the same was intended to apply where there was no differential shown from the points of origin, why, that should also have been included in the second paragraph. The two paragraphs are absolutely separate and distinct. You cannot read a part of the first paragraph into a part of the second—into the second paragraph.

Q. Whether or not any through route was shown by any part of the tariff between Pecos & Northern Texas points and Oregon Short Line points, there was a through route from Amarillo?

A. Yes, sir.

Q. And it was entirely possible for the carriers concerned to absorb, as they call it, the local from Hereford to Amarillo and make the Amarillo rate applicable from Hereford?

A. Yes, sir.

Recross Examination

Q. Well, now, your criticism of the tariff is purely your opinion as to how a tariff should be constructed?

A. No, I am not telling you how it should be constructed. I am undertaking to show my interpretation of the tariff as it reads.

Q. I thought you were criticising the construction of the tariff?

A. Oh, no.

Q. Oh, you have no criticism to offer of the construction of the tariff?

A. Well, I could offer some criticism, but I don't know.

Q. I am asking you what is the fact—are you or are you not?

A. No, I am not.

Q. You are not. I understood you were.

A. I am not criticising the tariff, no.

Examination by the Court.

Q. I do not yet understand how you make the estimate of the rate from Abernathy, where it has a differential. The estimate was made from Abernathy, Texas, 105 miles to Amarillo, and a charge was made of \$39.60. That is added to the Pocatello rate from Amarillo, \$116.50, which makes the rate from Abernathy to Pocatello \$156.10. I would

like to know why it is that you disregard the differential of \$8.80?

A. We disregard the differential, your honor, for the reason that in paragraph No. 1 of section No. 1 shown on page 24, where application and routing is provided on pages 56 to 69. Then when you turn to page 57 you find that those through routes do not apply where a differential is shown.

Q. Is that that blank space left there?

A. Yes. But that applies, according to the reading of the tariff, that part of the tariff is to be used only where differentials are shown.

Q. Then in making a rate you disregard the differential?

A. And add the local.

Q. You add the local?

A. Yes.

Mr. Hart. There is no dispute, your Honor, between counsel and myself as to that feature, and perhaps we can make it plain if it is not already plain.

Court: Well, then, according to this construction there would be a part of this matter that would be recoverable?

Mr. Hart: I think so. I think as to the Portland Feeder Company, that part of its shipment which moved from Abernathy must take the local rate from Abernathy to Amarillo.



Court: Then the mistake, according to your idea, was made in the first instance?

Mr. Hart: Evidently; because this tariff says that you can only use these differentials, such as that \$8.80 differential, where there is a routing shown on page 57.

Court: I see. It is pretty hard for me to understand. I will get it after a while.

Mr. Robbins: Do I understand you that we can eliminate the Feeder part of the case, then?

Mr. Hart: Only part of the Feeder case, because some of its shipments moved from Abernathy. So far as that Abernathy shipment is concerned apparently this tariff does not permit using the differential, but requires the local, because there is no routing shown. But the difference between that and all of the rest of the situation arises because all of the rest of the shipments originated at Hereford, which takes no differential, and the language of this second paragraph of section 1, which governs the situation when there is no differential, contains no such limitation; contains no reference to the chart and the routing, gives express authority for the use of that flat rate whereas in the case of Abernathy, where there is a differential, you can only use the differential, it says, where application and routing is provided on pages 53 to 69; but it is the failure to have that clause when the note speaks of stations like Hereford

which takes no differential, failure to have any reference to the application and routing on pages 56 to 69, and the explicit statement that the flat rate as shown in section 2 is to be applied, makes the difference.

Mr. Robbins: Mr. Hart, do I understand you are willing to concede we are entitled to recover on the Abernathy shipments, whatever they may be?

Mr. Hart: I think so, unless they are part of the ones which went beyond Butte, to a Chicago, Milwaukee & Puget Sound point. If they did that we have a radically different situation because then we have a situation originating at a Pecos & Northern point and going to a Chicago, Milwaukee & Puget Sound point, and there is a route number in the chart as between those carriers, so that I am not clear as to that.

Your Honor, I think there is no doubt but what a recovery is to be allowed so far as that part of the Feeder shipment which originated at Abernathy is concerned. Am I right in that, Mr. Lothrop?

A. I didn't catch that.

Q. That the Abernathy shipments, whatever shipments there were originating at Abernathy, under this tariff would have to be charged the Abernathy-Amarillo local rate?

A. Moving up over the Short Line.

Q. Yes.

A. Yes.

Mr. Hart: That is correct. I think I can make that admission in the case.

Mr. Robbins: That practically eliminates the second cause in the Feeder case.

Mr. Hart: Yes, I think that is correct.

Mr. Robbins: There were 32 cars there, 21 cars Abernathy to Pocatello, then 11 cars, making a total of 32 from Abernathy to Pocatello and American Falls.

Court: How much does that amount to in money?

Mr. Robbins: \$627.20.

Mr. Hart: I don't want to make that admission any broader than is necessary now, because I still want to reserve the right to check Mr. Robbins' proof, and if payment can be avoided I want to avoid it, because, of course, it is iniquitous so far as the individual shipper is concerned. But I do admit now that, so far as these Abernathy shipments are concerned, it was necessary under the tariff to charge the local rate from Abernathy to Amarillo.

Mr. Robbins: Well, then do I still understand, Mr. Hart, that you want me to go ahead with my proof on the second cause of action?

Mr. Hart: Well, I think I have made the admission about as broad as I can.

Court: Is that all?

Mr. Hart: That is all I have with Mr. Lothrop.

Mr. Robbins: Yes, that is all.

Excused.

R. A. Rankin, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Robbins:

Q. What is your business?

A. I am a clerk in the accounting department of the Oregon Short Line Railroad.

Q. In charge of what particular branch of the work?

A. Collection of undercharges.

Q. Who is your superior?

A. Mr. L. R. Wood, Auditor.

Q. L. R. Wood is the Auditor for the Oregon Short Line?

A. Yes sir.

Q. At Salt Lake?

A. Yes, sir.

Q. And you are the clerk in charge of undercharges under Mr. Wood?

A. Yes, sir.

Q. Now, how long have you been in charge of the undercharge bureau?

A. Nearly a year—11 months I believe.

Q. What were you doing previous to that time?

A. I was connected with the freight accounting department of the same company.

Q. And how many years railroad experience have you had in connection with undercharges and rates and things of that kind?

A. Twelve years.

Q. Now, as the head of the undercharge bureau, have you had any occasion to look into these cases which are in contest here today?

A. Yes.

Q. You are familiar in a way with those depositions that were taken that have not yet arrived?

A. Yes.

Q. I will ask you if the original contract and original waybills and some of those other original documents are attached to those depositions which are floating around Portland some place?

Mr. Hart: Well, I think we will wait and see about it. I object to that.

Mr. Robbins: He knows. He was there when they were taken.

Mr. Hart: Maybe he does, but he is not allowed to tell that.



Mr. Robbins: I want to account for those original documents to show why I am going to ask this witness some questions.

Court: I understand you are going to have those here?

Mr. Robbins: Yes, if counsel insists, I suppose.

Court: I will allow you to go ahead.

A. The original waybills and documents issued at the point of origin are attached to those depositions.

Q. Have you any duplicate originals here that we could use temporarily, of any of those documents?

A. I have the original contracts, or they are in the exhibits, covering that portion of the movement from Denver, Colorado to Pocatello, Idaho, I have in my possession here some original duplicates of contracts issued while the shipment was on the line of the Colorado & Southern. The balance of them are attached to those depositions.

Q. Have you any duplicate originals of any of the contracts entered into at any of the Texas points?

A. No, sir.

Q. They are all attached to that deposition?

A. Yes, sir.

Q. Well, have you any original waybills with you?

A. No, sir.

Q. When did you first have anything to do with the Portland Cattle Loan situation?

A. In the month of June of last year.

Q. June of last year. Just tell the court how it was turned over to you, or what you were doing at that time with it.

A. I was connected with the freight accounting department shortly prior to that time and was transferred from the freight accounting department to the miscellaneous accounts, where the undercharges are handled, with a view of taking charge of the undercharges and adjusting them in the account as was, or is found to be proper. This claim against the Portland Feeder Company and the Portland Cattle Loan Company—

Q. Pardon me just a moment. By "this claim," what are you referring to? Are you referring to these exhibits 4 and 5?

A. Well, that is a portion of the claim.

Q. Make it a little more specific if you can.

A. The undercharges against the Portland Feeder Company and the Portland Cattle Loan Company were retained in the account, and came to me as a portion of my duties, to see that the matter was properly adjusted; that is, determine if the amount we were endeavoring to recover was the correct amount, and if it was not the correct

amount, to adjust the matter in our account to the correct basis and secure settlement of the undercharge. That is the manner in which I came in contact with the conditions entering into the transportation of these cattle, the collection of charges on the cattle from the Texas points to Pocatello, American Falls, Monida, and Butte, final destination, Piedmont on the last shipment.

Q. Just state briefly, without going into details, how you checked this matter up; just a brief outline of how you checked this matter up and what you did.

Mr. Hart: This was just last summer, was it?

Mr. Robbins: Well, it is when he took charge there.

Mr. Hart: I cannot understand how that could be material, your Honor.

Court: Well, I suppose it is really a construction of the tariff that we are getting at.

Mr. Robbins: This man was called upon to construe the tariff.

Mr. Hart: The claims were made, of course, long before that.

Court: You say they were?

Mr. Hart: Oh, yes, the claim was made on us in April, 1915, three months after the Idaho refund had been made.

Court: And this is last June?

A. Yes, sir.

Mr. Hart: This is last June, this witness is testifying to.

Mr. Robbins: You see we paid some money in error. We are trying to get it back.

Mr. Hart: I don't admit that. The payment to us was entirely proper. No one has ever disputed it. The dispute is in reference to the Texas end of the situation. The overcharge to us was entirely proper.

Court: The real condition is, as far as this witness is concerned, he is being offered as an expert—isn't that it?

Mr. Robbins: Partly, your Honor, and partly as to what actually transpired there in the accounts. He handled the accounts and made the payments. He is the man who actually handled it.

Court: Back in 1915?

Mr. Hart: No.

Q. Did you handle any of it in 1915?

A. Not as or in an endeavor to effect any adjustment by and between the Feeder Company or the Portland Cattle Loan Company and our company. At that time I was connected with the freight accounting department. I recollect distinctly the situation as it came up and how it came up. That is all.

Mr. Hart: But the first time you officially took hold of it was last summer?

A. Yes.

Mr. Hart: Well, now, if he wants to ask him if he examined the tariffs and what his opinion is, all right, I have no objection, because he has made some attempt to qualify.

Mr. Robbins: This man actually checked those payments and made them, your Honor. I want to offer him both as an expert and as to what he actually did there.

Court: Very well, go ahead. The court will hear you.

Q. In checking these rates, is it any part of your duty, or did you undertake to apply the tariff to these shipments to see what the correct charges were?

A. Yes.

Q. And what experience have you had in interpreting tariffs?

A. Well, I have been an agent of one or more companies, and as such I am required to base the charges on freight and passengers from here to there in the assessment and collection of charges. I have been employed in the revision department of the Oregon Short Line Company, in the accounting department—the revision bureau of the accounting department, where all waybills entering our



office are revised and determined that the charges are properly assessed.

Q. What is the fact as to whether or not it is part of your duties to check these different bills as they come through and see whether or not the tariff has been properly applied?

A. It is.

Mr. Hart: It is now part of your present duties?

A. Yes, sir.

Q. And before you took the position, there was another man doing the same thing?

A. Yes, sir.

Mr. Robbins: The point I am getting at is, his department is the one that checks these.

Q. Now, Mr. Rankin, I am now referring to the Portland Cattle Loan case. I will ask you if you checked up a shipment of 44 cars of cattle moving from Hereford to Pocatello and Butte on September 28, 1912, consigned by Greenameyer to the Portland Cattle Loan Company finally? That is they finally got it.

A. Yes, sir.

Q. I will ask you if you made a memorandum that is, took a memorandum off from your files showing the different cars and the movement and the application of the rates as you construe them?

A. Yes, sir.

Q. I will ask you if that is the statement his Honor has there, which was prepared under your jurisdiction?

A. Yes, sir.

Q. I will ask you, while we are about it, if you prepared a similar one for the Feeder Company?

A. Yes, sir.

Mr. Robbins: We offer these two statements in evidence, for the purpose of expediting this witness's testimony more than anything else.

Court: Have you any objection?

Mr. Hart: Not if it will assist your Honor. I don't suppose they are technically admissible.

Court: Do you want this plat to go with it?

Mr. Robbins: Yes, I guess that may as well go in.

Statements marked plaintiff's Exhibit 6 and plaintiff's Exhibit 7, and plat marked plaintiff's Exhibit 8.

Q. Now, Mr. Rankin, I will ask you if you are familiar with the southwestern territory down there, in around Amarillo?

A. Yes.

Q. And what railroad is it that extends from Hereford and Abernathy to Amarillo, if you know?

A. The Pecos & Northern Texas.

Q. And what road from Amarillo to Texline?

A. Fort Worth & Denver City.

Q. And from there to Denver?

A. The Colorado & Southern.

Q. And Denver to Granger?

A. Union Pacific.

Q. And Granger to American Falls, Pocatello, Idaho Falls, Monida, Dillon and Butte?

A. The Oregon Short Line.

Q. And Butte to Piedmont?

A. The Chicago, Milwaukee & Puget Sound.

Q. Now, referring to this statement which was prepared, how did you arrive at the computation of \$26.40 on that G. H. & S. A. car from Hereford to Amarillo?

A. How did we arrive at it?

Q. Yes: you show here that the correct charge is \$26.40.

A. Yes.

Q. How did you arrive at that?

A. The rate is that quoted in A. T. & S. F. Company's tariff 6016-E.

Q. Well, now, you mean this plaintiff's exhibit 1, is that the tariff you are talking about?

A. Plaintiff's exhibit 2.

Q. Plaintiff's exhibit 2, oh, yes. Well, go ahead and explain to the court now how you made that \$26.40.

A. Amarillo is a town located a little south and west from Hereford. I mean Hereford is a little town located south and west from Amarillo; in fact, 47 miles from there, as indicated in the various tariff sheets; and in accordance with provision of the tariff, which is on a mileage basis, we apply the rate applicable to a shipment moving 50 miles, by reason of a note in the tariff that says, "When exact distance is not shown, use next greater distance."

Q. Refer to the page in the tariff you are reading from.

A. This is page 2 of Supplement No. 5. of A. T. & S. F. tariff No. 6016-E, I. C. C. No. 5820; and the rate for the transportation of this shipment for 50 miles is 12 cents per hundredweight on cattle in carload quantities with a minimum weight of 22,000 pounds, as provided in this tariff on that page.

Q. Mr. Rankin, in referring to those, please refer to them as plaintiff's exhibits 1 and 2 instead of the I. C. C. numbers.

A. Yes. I believe that describes the rate from Hereford, Texas, to Amarillo, does it not?

Q. Did you state that was a mileage of 47 miles?

A. Yes.

Q. And under the note in the tariff, you apply the mileage of 50 miles?

A. Yes.

Q. That makes your local, then, from Hereford to Amarillo of \$26.40?

A. Yes.

Q. How did you arrive at the computation of the rate from Hereford to Pocatello that you show here?

A. Hereford to Pocatello?

Q. Yes, you say the correct rate here is \$142.90, Tell the court how you arrive at that.

Court: From Amarillo to Pocatello?

A. From Hereford to Pocatello.

Court: I think I understand that. That is by adding the local rate to the rate from Amarillo to Pocatello. That was described by Mr. French very clearly.

Q. That is correct, is it not? It is a combination of the local plus \$116.50?

A. Yes, sir.

Q. Now, then, the same computation, the same system would be used in the Hereford-Butte rate of \$171.20?

A. Yes, sir.

Mr. Hart: There is no dispute about those things.

Mr. Robbins: Yes. Well, I am just merely explaining how he arrives at this.

Mr. Hart: Mr. French explained it fully.

Mr. Robbins: Yes.



Q. Now, do you find a through rate from Hereford to Pocatello in that tariff?

A. Yes. No, not from Hereford to Pocatello—beg pardon; not from Hereford.

Q. What do you find with reference to Hereford?

A. Hereford, Texas, is a point located on the P. & N. T. Railway. I do not understand that any other railway passes through it or enters it excepting the P. & N. T. Railway. A rate is dependent to a greater or less extent upon the route, and in order to determine the rate it is necessary to determine the route. Therefore we will have to find out where the station is and over what roads it would pass to the points of destination. And by reference to this plaintiff's exhibit 1, tariff No. 100-A, on page 57, we have routing and application. We determine that the Pecos & Northern Texas Railway Company and the Short Line do not jointly or together agree to quote a through rate from Hereford to Short Line points as indicated. In Note 1, Item 360, which is opposite to this page 57 where the route is quoted, it reads: "Where route number is not shown there are no through rates applicable from the originating line."—I would understand from that that there are no through rates applicable from Hereford, Texas, or any other P. & N. T. point to any point on the Oregon Short Line.

Mr. Hart: Except Amarillo?

A. Excepting none. Amarillo, while it is on the P. & N. T., and also on the F. W. & D. C., or the Fort Worth & Denver City, would, so far as a shipment originating at Amarillo is concerned, not be a P. & N. T. point. The P. & N. T. Company would not in any way enter into the shipment.

Court: Well, the P. & N. T. Company, is that an interstate line?

A. Your Honor, yes, a portion of the A. T. & S. F. Railway Company, or at least that is my understanding. It does not run interstate, but it receives freight handled interstate, and in that way is a part of the interstate.

Court: It is local?

A. It is within the state of Texas.

Q. Now, Mr. Rankin, something has been said here about the application of Item 200, I believe, not applying where there are no differentials. Will you explain that to the court, please?

A. Section No. 1, that is on page 24 of tariff 100-A, Item 200 is, "Governing use of differentials shown in section No. 1, pages 24 to 31 inclusive."

"The differentials shown in section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates as shown in section No. 2 hereof, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69."

I would not understand that paragraph, your Honor, to mean anything except that when routing instructions were provided on any of the pages from 56 to 69 there would be a through rate; when there was no route provided, there would be no through rate. There is no route provided, therefore there is no through rate from Hereford, Texas, or any other P. & N. T. point, to any O. S. L. point.

Q. What is your construction of the second paragraph of Item 200?

A. "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in section No. 2 are to be applied as indicated."

Q. Well, now, how are they indicated?

A. In section No. 1 we have various differentials to be added to or deducted from these various basing points. They are for application in connection with shipments transported over routes indicated on pages 56 to 69, if I am not mistaken in the page number.

Recess until 2 p. m.

Q. Now, Mr. Rankin, in your statement here in the Portland Cattle Loan Company, you show the original collection as \$136.50. How was that rate constructed, if you know, to make that \$136.50?

A. Combination over Amarillo, \$20 to Amarillo and \$116.50 Amarillo to Pocatello, using Idaho Falls as the rate basis.

Court: What does that refer to?

Mr. Robbins: Portland Cattle Loan shipment Hereford to Pocatello.

Q. How many cars were in that shipment that the court is asking you about? It is indicated in the statement.

A. 27 cars.

Q. That is 27 from Hereford to Pocatello, and then the one from Hereford to Amarillo?

A. One.

Q. Making the 28?

A. 28 cars, yes.

Q. 27 and one.

Court: You say you make that total \$136.50?

A. Yes, amount collected. That is the amount collected at time of delivery, \$136.50 per car.

Q. Well, now, out of that \$136.50, did you make any refund?

A. Yes, there was a refund made on 27 of the cars, those 27 cars destined to Pocatello.

Q. Explain to the court how that came about?

A. The Portland Cattle Loan Company filed a claim for alleged overcharge with our freight claim department, and it was paid. That overcharge was \$20 per car. It was alleged that that \$20 represents or represented a back haul from Idaho Falls to Pocatello. But, as a matter of fact, we refunded \$20



collected and paid by our company to the P. & N. T. Company. Therefore we paid the P. & N. T. Company the \$20, and also the Portland Feeder Company \$20 on those 27 cars.

Court: \$20 apiece?

A. We paid the Portland Feeder Company in refund on account of the alleged overcharge, and we paid the P. & N. T. Company in interline settlement, which is the customary manner of disbursing of moneys collected for these lines. We hoped to secure credit by charging the various carriers interested, but upon applying to these carriers for authority to charge their companies with the amounts paid on account of the alleged overcharge, it was pointed out to us, the Short Line Company, that we were in error in refunding the amount, and that the correct charge for transportation of the cattle from Hereford to Amarillo was \$26.40, and that there was no through rate from Hereford, Texas, to Pocatello, Idaho; that it was made up of a combination over Amarillo.

Mr. Hart: You are speaking now, if I may interrupt, of something that was done prior to the time that you came into the transaction?

A. I am speaking simply from the records of our company.

Mr. Hart: That is what I am asking.

A. I have no personal knowledge that this ship-



ment moved other than what I have gained from the records.

Court: The \$20 overcharge was an erroneous charge in the first place?

A. No, it was not an erroneous charge. We collected \$20 for the transportation of the shipment to Amarillo.

Court: I mean in the first instance when the charge was made?

A. \$20?

Court: Yes.

A. No, it was insufficient at that time even.

Court: I know. But leaving out the construction, you are giving the rates now, the \$20 was an overcharge in any event?

A. I don't understand it as such.

Mr. Hart: That is the point that I have made. If I may ask the question, perhaps it will get at what Judge Wolverton means, the \$20 collected over the \$116.50. You collected \$136.50 for these cars?

A. Yes, sir.

Examination by Mr. Hart.

Q. That was intended at the time of the collection to include \$116.50 for the trip to Idaho Falls and \$20 for the back haul to Pocatello, was it not?

A. I don't understand it that way.

Q. Well, you don't know anything about it, as a matter of fact, do you?

A. Yes.

Q. What do you know, anything more than the records show? You don't mean to say to the court here, do you, Mr. Rankin, that that \$20 was intended at the time of the collection to cover the trip from Hereford to Amarillo?

A. I certainly do.

Q. You do?

A. Yes.

Q. Have you got anything to show that it was so intended?

Mr. Robbins: Well, now, if the court please, he has answered the question. I would like to finish my examination.

Court: What I was trying to get at, there was a charge of \$116.50 from Amarillo to Pocatello, and then they made a charge of \$20 for the back haul from Idaho Falls, and that was paid, and afterwards the shipper came back claiming that \$20 was an overcharge, so that the charge from Hereford to Amarillo was never included in that charge where they claimed the overcharge.

Mr. Hart: That is the point I made to the complaint in this case. I have always said that if we owed anything, it was the balance over and

above what had been finally paid, taking the overcharge into consideration—taking the refund into consideration. The refund, as we claim, was intended to cover this overcharge from Idaho Falls to Pocatello. Then they come back and say that the transportation from Hereford to Amarillo should be collected, which is \$26.40, and they ask us to pay back to them the \$20 they refunded us and also \$6.40. Now, the amounts are not the same. The overcharge is unquestioned, as I understand it, and the point involved in the case is whether or not the Hereford-Amarillo local of \$26.40 is collectible.

Court: Taking their claim, the charge from Hereford to Amarillo was \$26.40?

Mr. Hart: Yes, that is the local rate.

Court: And the rate from Amarillo to Pocatello is \$116.50?

Mr. Hart: Yes.

Court: Now, then, that is what they are claiming now as being the correct charge?

Mr. Hart: Yes, that is their present construction of the tariff.

Court: Now what they collected before, in the first instance, was \$116.50 plus \$20 for the back haul?

Mr. Hart: Yes.

Court: So that is \$136.50 that they collected?

Mr. Hart: Yes.

Court: But they said they were wrong in charging the \$20 back haul, and therefore they paid that back?

Mr. Hart: Yes.

Court: So that now they claim, under this contention, the two items of \$26.40 and \$116.50, that makes \$142.90.

Mr. Hart: That is their present claim of the rates, yes.

Court: Yes. The \$26.40 would be the amount really that they claim now on each car?

Mr. Hart: I so understand it, yes. And I thought that situation had been established by the correspondence that is, by Mr. Reeves and Mr. McNitt's letters, that they recognized the impropriety of exacting the \$20 for the Idaho Falls-Pocatello back haul; but this witness, as I understand, is testifying that that \$20 was never collected for that purpose at all, but intended to cover or apply on the \$26.40 from Hereford to Amarillo.

Court: It is a matter of construction. I would like to hear the witnesses, however, on the matter.

Examination by Mr. Robbins Resumed.

Q. Mr. Rankin, what does the \$20 cover?

A. The \$20 covers or was intended to cover, that portion of the transportation furnished from Hereford, Texas, to Amarillo, Texas.

Mr. Hart: I move to strike that out, because the witness obviously could not have any knowledge of the intention.

Court: It is very obvious to my mind that the witness is laboring under a mistake. Of course, the shipment was made from Hereford to Amarillo, and then to Pocatello, and then on to Idaho Falls. The matter of charge, first charge, was made on the two items, from Amarillo to Pocatello, and then \$20 for back haul. Isn't that right?

Mr. Robbins: Partly so, your Honor.

Q. Now, Mr. Rankin, have you looked into this matter, examined the records back from the inception of this shipment, to see what has been done in regard to these refunds?

A. Yes.

Q. Now is there any explanation you want to make in connection with this \$20 refund covering the amount from Hereford to Amarillo?

A. Yes.

Mr. Hart: I don't think he should make explanations of his idea. We introduced in evidence letters from the Short Line people showing how the refund came to be made, and showing it was this back haul of \$20. It is not right to permit now this witness to say what his idea is gained from perusal of correspondence.

Court: They put him on as an expert.



Mr. Hart: If he has any correspondence or any record which negatives that proof that is shown in the letters of Mr. McNitt and Mr. Reeves, all right; but as an expert I don't think it would be permissible for him to say what his idea is of the correspondence and records.

Court: That would be a matter for the court to interpret. I am inclined to hear this testimony because I want all the light I can get on it. You may explain.

A. My understanding, and the reason for my statement that the amount of \$20 is for payment of that portion of the transportation from Hereford, Texas, to Amarillo, is based on the fact that we paid that amount to the initial carrier for that service, in interline settlement with that carrier.

Q. That you paid to the Pecos & Northern Texas the sum of \$20 per car?

A. Yes, sir.

Q. To cover the haul from Hereford to Amarillo?

A. Yes.

Mr. Hart: When?

A. It will be necessary to refer to the record.

Q. Have you got them there with you?

A. They are in Mr. Wood's deposition.

Q. Well refer to it.

A. The record doesn't seem to be here.

Q. There is one of them, the copy, I guess will do.

A. Well, I wish the original record.

Q. Have you found it?

A. Yes, I have it.

Q. Go ahead. Answer the question.

A. November and December, 1912.

Q. And how much was paid to the Pecos & Northern at that time?

A. \$880.

Q. That is, \$880 paid to the Pecos & Northern Texas Railway Company.

A. Pecos & Northern Texas Railway Company.

Court: I suppose the Pecos & Northern Texas collects for the entire freight to its point of destination?

Mr. Hart: No, it was collected at destination, if your Honor please, at Pocatello.

Court: And then distribution made between the different roads according to their agreement between them as to what proportion each should receive?

Mr. Hart: Yes.

Q. Now, you made a refund there of \$20 a car, covering—or rather, that refund of \$387.70 which you made on January 30, 1915, what did that cover?

A. That covered a supposed overcharge for back

haul from Idaho Falls to Pocatello which did not exist.

Q. Go ahead and explain that a little fuller.

A. As brought out in the testimony we had collected \$136.50 per car for the transportation of those cars destined to Pocatello. That amount represents only the \$20 per car for transportation from Hereford, Texas, to Amarillo, and \$116.50 for transportation from Amarillo to Pocatello. In the filing of the claim and investigation of it, through some error or oversight, it was understood that this \$20 was collected as a back haul from Idaho Falls to Pocatello, and was consequently refunded as an overcharge.

Q. Well, now, \$340 of that was the actual refund, wasn't it and \$47.70 covered interest?

A. Yes, sir.

Q. So that in reality there was \$340 refund made there on January 30, 1915. Now, what did that other refund of \$228, \$200 and \$28 interest, which was made on February 17, 1915, what did that cover?

A. The first refund was on 17 cars, the latter refund was on ten cars and was made up and explained in the same way.

Q. And those shipments were moving from Hereford to Pocatello?

A. Yes.

Q. Now, what were the total charges, then, paid

on account by the Portland Cattle Loan Company?  
Do you have a memorandum of those things?

A. Yes.

Mr. Hart: Hasn't he testified to that, Mr. Robbins?

Mr. Robbins: It is not very clear.

Mr. Hart: There is no dispute about it, and it has been testified to several times.

Mr. Robbins: I think he ought to explain it here for his Honor. It is not quite clear.

Q. In order to expedite the matter, refer to that memorandum you have there, that you have been using. Will that expedite the matter in any way?

A. Possibly. These columns are not footed.

Q. Have you got a memorandum there that you can refer to quickly, without consuming too much time?

A. Yes.

Q. What was the total amount collected, then, from the Cattle Loan Company?

A. In payment of freight charges, \$6342.30.

Q. And what is the total of those refunds, then?

A. \$615.70.

Q. Well, then, deducting those refunds from the amount paid would leave a balance due there, or a balance actually paid, of \$5726.60?

A. I haven't that calculation, but I presume it would be right.

Q. It would be the difference between \$615.70 and \$6342.30?

A. Yes, sir.

Q. Now, then, on your computation, what were the total charges due?

A. Total charges due?

Mr. Hart: It is all stated on this memorandum of yours, isn't it?

Mr. Robbins: No, that is not footed up.

A. They are not footed. They are per car here, but not footed.

Mr. Hart: It is a mere matter of computation.

A. That is all. \$6623.90.

Q. Then the difference between \$5726.60 and \$6623.90 is the amount that we are claiming here on this Loan case?

A. Yes.

Q. That is \$897.30?

A. Yes.

Q. But in that calculation there is included \$75.70, which was paid in those refunds?

A. Yes.

Q. Which practically does not cover transportation charge? That is a matter of interest?

A. Yes.

Q. Now, then, on the Butte shipment, Hereford



to Butte there were 36 cars in that shipment, were there?

A. There were 16 cars.

Q. No, no. 16, yes, 16 cars from Hereford to Butte. They are the last 16 cars shown on the Cattle Loan statement there. Now, there was no refund made on those cars, was there?

A. No, sir.

Q. And the original collection there, as shown here, is \$164.80?

A. Yes, sir.

Q. The calculation was made just the same as you have already explained, with the exception of from Pocatello to Butte?

A. Yes.

Q. Just tell the court how you made the calculation from Pocatello to Butte—what you based it on.

A. The rate from Hereford to Butte is made similarly to the rate from Hereford to Pocatello, except that a through rate from Amarillo, Texas, to Dillon is used instead of the through rate from Amarillo to Pocatello. And in addition to the rate from point of origin, Hereford to Dillon, the local from Dillon to Butte is added to secure the rate applicable from point of origin to Butte.

Q. Now, Mr. Rankin, you have checked these car numbers and initials against your records there that you have with you, have you?

A. Yes, sir.

Q. You have also checked the routing?

A. Yes, sir.

Q. What routing do you say this took? What was the routing?

A. Shipment from Hereford moved via the P. & N. T. to Amarillo, via the Fort Worth & Denver City to Texline, via the C. & S. Texline to Denver, via the Union Pacific Denver to Granger, and via the Oregon Short Line Granger to destination—Pocatello and Butte.

Q. Now referring to the first cause of action in the Feeder case, there are 36 cars there, moved from Hereford to Monida, your statement shows?

A. Yes.

Q. Now, the calculations would be just the same up to Pocatello, would they, as you have already described from Hereford to Pocatello?

A. Yes, the rate is made in the same way as that rate applicable to Pocatello.

Q. Well, how about the rate from Pocatello to Monida?

A. There is a rate quoted through from Amarillo to Monida. So you take the through rate from Amarillo to Monida plus the local from Amarillo to Hereford.

A. Yes, sir.

Q. Now, you figured that out on here, there is

no use stopping to calculate it, I take it, and your original collection on that movement was \$138.50?

A. \$138.50 per car.

Q. And how is that made up, that \$138.50?

A. The rate as primarily collected simply in the same way as described in connection with those shipments destined to Pocatello—\$20 for transportation of that portion of the movement from Hereford, Texas, to Amarillo, and \$118.50 from Amarillo to Monida.

Q. Then you say here in your statement the correct charge is \$144.90. That is, there was an undercharge of \$6.40?

A. Yes.

Q. How did you arrive at that \$6.40?

A. \$6.40 undercharge is the difference between the \$20, as originally allowed the Pecos & Northern Texas for their proportion of the haul, and the amount as stipulated in this local tariff.

Mr. Robbins: Now, I am not quite clear whether it is necessary to refer to this second cause or not. I understand you practically admitted our allegations on that, Mr. Hart?

Court: They admit that providing their theory of construction is correct. If it proves to be incorrect then that would alter it.

Mr. Robbins: It would not be necessary for me to offer proof on that second cause, then?

Court: I understand that is your position?

Mr. Hart: Yes, your Honor.

Q. Now, what do you say about the routing of this shipment from Hereford to Monida? Would the routing be the same as you have already described?

A. Identically.

Q. Have you checked these car numbers on the exhibit?

A. Yes.

Q. Know them to be correct. Now, on this Monida shipment, what was the payment on account? That is, how much was collected there, the total collection?

A. In payment of freight charges \$4986.

Q. And what was the correct charge as totaled?

A. \$5216.40.

Q. So the difference between \$5216.40, what we claim is the correct charge and \$4986, the amount that was paid on account, would be \$230.40?

A. Yes, sir.

Q. That is what we are asking on the first cause of action?

A. Yes, sir.

Q. And on the second cause of action, what was the payment on account there?

A. For the 21 cars destined Pocatello \$2866.50; on the 11 cars destined American Falls \$1655.50.

Q. That makes a total of \$4522 paid on account, then?

A. Yes.

Q. And the difference, then, between \$5149.20, which we claim is the correct charges, and \$4522, the amount paid on account, or \$627.20, is the amount we are claiming there on the second cause of action?

A. Yes.

Q. Making a total due, on both the first and second causes, of \$857.60, or whatever it figures out there?

A. Yes.

Q. Now, I notice you have a heading here "Freight Bill," "Waybill Reference." Just tell the court what you mean by that heading.

A. In describing the headings, the first "Car Initial & No." is descriptive of the initial and number. The next describes the point of origin of the shipment. The next "Waybill Reference" describes the issuing station, that is, the station issuing the waybill, the station from and to, and the date. The waybill is a document accompanying the shipment from point of origin to destination, passing with the shipment through the different junctions and over the different roads. The next



“Freight Bill” is a document used in giving a receipt to the consignee for any amount paid, and taking his receipt for freight delivered. It is made in duplicate.

Q. Now, is there any further explanation you desire to make to the court at this time?

A. No.

Cross Examination.

Questions by Mr. Hart:

Q. Mr. Rankin, you said you are now a clerk in employ of the auditor's office of the Short Line?

A. Yes, sir.

Q. In charge of the revision of accounts?

A. No; in charge of collection of underpaid accounts.

Q. And you took that position about a year ago?

A. Yes, sir.

Q. And when you took the position you inherited with it all the old undercharge claims?

A. Yes, sir.

Q. And you have been active in the prosecution of this matter since that time?

A. Yes.

Q. You are the man who furnished the information to counsel for the commencement of the proceedings?

A. Yes.

Q. Before going into that work in the auditor's office, you were in the freight accounting department?

A. Yes, sir.

Q. And what particular work were you doing there?

A. I had charge indirectly of station accounts.

Q. What do you mean by indirectly?

A. Well, there was a man appointed as head of a bureau. I was his assistant. In his absence I had charge.

Q. Checking station accounts?

A. Checking station accounts.

Q. And how long were you at that work?

A. Four years.

Q. That is in the receipts division?

A. No. The receipts divisions? I don't understand. There is no such title as that.

Q. You do not have an auditor of freight receipts?

A. No, sir.

Q. And prior to doing that work, what were you doing?

A. Telegraphing on the D. & R. G. and acting as cashier.

Q. So that your experience with rates and with tariffs includes such work as you had as tele-

grapher and station clerk, or station agent, and then in the office checking station receipts, and then looking after the collection of undercharges?

A. Yes, sir.

Q. Now, Mr. Rankin, you testified that this \$20, which was collected in the first instance on all of these shipments, in addition to the \$116.50 rate from Amarillo, you concluded had been collected to cover the transportation up to Amarillo?

A. Yes.

Q. And you came to that conclusion because you found that your company paid to the Pecos & Northern Texas \$20 a car?

A. Yes.

Q. Have you any idea why they made it \$20. The local rate was \$26.40.

A. Yes.

Q. And they could not have been endeavoring to pay the local rate, could they?

A. Yes.

Q. Well, now, I notice on the Abernathy shipments that originated at Abernathy.

A. Yes.

Q. Where the local rate is some \$39.50 to Amarillo I notice there was some \$20 collected there also. Do you think that was intended to cover the local?

A. Yes.

Q. You think somebody made a mistake in calculation?

A. Yes.

Q. And that it was \$20 even that was collected for that purpose?

A. Yes.

Q. Although there is not any tariff authority anywhere for such a charge?

A. There is tariff authority, but it is not applicable in the case.

Q. Well, now, don't you think, as a matter of fact, Mr. Rankin, that the \$20 was paid to the Pecos & Northern under the supposition that that was to be the allowance to that company for its share of the transportation regardless of what the through rate charged the shipper was?

A. No.

Q. You think not?

A. I know not.

Q. Oh, you know? Were you there?

A. No.

Q. Well, when you say you know, you mean you have formed a conclusion to that effect? That is true, isn't it, bearing in mind that your acquaintance with this matter began a year ago?

A. Yes.

Q. You are hardly in a position to say you know anything about it absolutely?

A. Well, only from our records, which are, no doubt, correct.

Q. Yes, and you have told us about those?

A. Yes.

Q. Now, you seem so positive about this transaction, Mr. Rankin, you tell us that you prepared the figures for your counsel to begin this suit, I ask you if it is not true that when this suit against the Portland Cattle Loan Company, was begun, the amount demanded of the Cattle Loan Company, instead of being \$897.50 was \$1437.30?

A. Such might be the case.

Q. Yes; and when you furnished the figures to your counsel, to Mr. Robbins, to commence this suit, you told him that the Cattle Loan Company owed you \$821.60, representing an undercharge at the Texas end, and \$615.70 which you had improperly refunded them for the Idaho end, and you asked him to sue the Portland Cattle Loan Company for \$1437.30? That is a fact, is it not?

Mr. Robbins: Now, Mr. Hart, I didn't prepare the pleadings. They were prepared at Salt Lake.

Mr. Hart: Well, wherever they were prepared. I want to get at this witness's idea.

Q. That is the fact—that is the information?

A. It is my recollection that it was primarily



filed for some other amount. I don't know what the amount was now.

Q. It was covering two amounts, and it aggregated about \$1400, did it not?

A. It was in that neighborhood.

Q. Now, then, when you first prepared this statement of accounts, this statement of alleged undercharges on the Cattle Loan Company shipment, it was not quite in the form in which you have offered it in evidence was it?

A. I did not prepare that statement.

Mr. Hart: Please mark this statement.

Marked "Defendant's Exhibit A."

Q. I show you Defendant's Exhibit A and ask you if it is a copy of the undercharge statement against the Cattle Loan Company as first prepared?

A. It has that appearance.

Q. Yes. Now, then, it is a fact, isn't it, that this statement, Defendant's Exhibit A, which is made up in exactly the same form as the exhibit you have offered a moment ago, this statement shows that the total undercharge claimed from the Cattle Loan Company was \$1127.70? That is a fact, isn't it?

A. Yes.

Q. So that we have first this statement, made up in your office or the office of your company,

showing \$1127.70 as the claim?

A. Yes.

Q. And then we have the figures given to the attorneys for the preparation of the suit, showing \$1400 claimed; and now we have your statement offered in evidence showing \$897.60 as the under-charge claim. Someone evidently has been making quite a number of mistakes, hasn't he?

A. It looks that way.

Q. It looks that way indeed. But you are prepared to say that you know what this situation is?

A. Yes.

Q. Take these Abernathy shipments: The differential provided in this tariff, the differential over Amarillo provided in the tariff is some \$9, is it not?

A. \$8.

Q. \$8. The local rate, if the differential could not be applied because there was no through routing, the local rate would be \$39.60, wouldn't it?

A. That is as I recollect it.

Q. Now, your company paid to the Pecos & Northern Texas \$20 a car—neither one of those amounts. You still think, though, that that payment was made on the assumption that that covered a local rate from Abernathy to Amarillo, do you?

A. Yes.

Q. And that is 110 miles or thereabouts?

A. 105 miles.

Q. 105 miles. And exactly the same amount, that is \$20 a car, was collected on the Hereford shipments, and you think that that was intended also to cover the local rate from Hereford to Amarillo?

A. Yes.

Q. Although Hereford is 47 miles from Amarillo?

A. Yes.

Q. Well, somebody had another strange notion of the situation there, I suppose. Now, I ask you these questions, not to annoy you, but to suggest to you in all fairness that the strong probability is—and we are dealing with probabilities because we haven't the facts—the strong probability is that this flat allowance of \$20 was paid to the Pecos & Northern Texas Company under the supposition that that was the division by agreement between the companies?

A. No, sir.

Q. No? All right. Now, you said that the tariff, this tariff, Plaintiff's Exhibit 1, shows no through rate between Hereford and Idaho points on the Short Line? That is your statement?

A. Please state that again?

Q. I say, you say this Exhibit No. 1 shows no

through rate from Hereford to Idaho points on the Short Line?

A. No.

Q. And you say that that is so because on the chart, on page 57, it appears that the Short Line and the Pecos & Northern Texas did not get together on an agreement for a through rate between their two lines? That is the inference you draw from the absence of that writing? That is true, is it?

A. Yes.

Q. Now, then, even though there was no agreement between those two companies, I suppose there would be nothing to interfere with the lines between Amarillo and Pocatello agreeing between themselves that they would apply the Amarillo rate on shipments from Hereford, and do what is known as "absorb" an allowance to the Pecos & Northern Texas so that the shipper might have the benefit of the Amarillo rate, and still the Pecos & Northern Company be paid something by these carriers between Amarillo and Idaho points? There would not be any objection to such an arrangement even though the Pecos & Northern and the Short Line have not gotten together on an agreement for a through rate?

A. If that was incorporated in the tariff, it would be in effect. Otherwise, it would not be.

Q. Yes, all right. If the tariff had a plain statement, so plain that even you and the railroad rate men would recognize it, had that plain statement that shipments originating at Hereford and destined to Short Line points would take the Amarillo rate—had that statement clear beyond shadow of a question—then, if there was no through route specified, it would be apparent that the lines north of Amarillo would have to assume or absorb that, whatever the Pecos & Northern charged them for the local transportation to Amarillo, and the shipper would be entitled to the Amarillo rate?

A. The other carriers would shrink their revenue, or they would not be permitted to receive as much revenue in a case of that kind as in application of the rate.

Q. They would have to take care of this Pecos & Northern transportation charge, whatever it was?

A. Yes.

Q. So that, if the tariff did read that way, even though they did not have a through arrangement, it would still be possible to give the shipper the benefit of the Amarillo rate?

A. Yes.

**Redirect Examination.**

Q. Mr. Rankin, counsel has asked you about this Portland Cattle Loan Company statement, Defend-



ant's Exhibit A, which totals up \$1127.70. I will ask you to examine that and state whether or not it is the fact that all these claims are contained in that statement. For instance, those 36 cars from Hereford to Monida in the Portland Feeder case are in that statement, aren't they?

A. Yes.

Q. And the 21 cars from Abernathy to Pocatello, the 11 cars from Abernathy to American Falls, are they in there too?

A. No.

Q. Well, the Monida shipment was made by the Feeder Company, wasn't it?

A. Yes.

Q. That is the Loan statement you have got there, isn't it?

A. Yes.

Q. So that mistake comes about by putting some of the Feeder shipments in the Loan statement, don't it?

A. Yes.

Mr. Hart: That is Mr. Robbins' idea of the matter. You are leading the witness.

Mr. Robbins: Examine it, Mr. Hart, and see if you don't agree with me at once.

Mr. Hart: Let me ask, then, this statement was prepared considerably before the time of the commencement of the law suit, was it not?

A. Yes.

Excused.

G. M. Velguth, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Robbins:

What is your business, Mr. Velguth?

A. I am assistant chief clerk in the car service department of the O.-W. R. & N. Company.

Q. At Portland?

A. Yes, sir.

Q. Now, I will ask you if you checked the size of these cars here at my request and made a memorandum of the size of those different cars?

A. I did.

Q. Tell the court where you checked them and how you checked them; that is, not in detail, but where did you get your information?

A. I got my information from the Railway Equipment Guide that lists the dimensions of cars owned by lines.

Mr. Robbins: Counsel admits these were 36 ft. 6 inch cars. That is what we were going to prove by this witness, so there is no use taking any further time with that.

Mr. Hart: Yes.

Court: Very well.

Excused.

Mr. Robbins: Now, if the court pleases, that is our case, with the exception of those depositions that are floating around the town some place. We think it is necessary to have those depositions in this case, and I have two men out looking for them. They are supposed to be here in town some place, but I have no assurance as to when they will locate them. We feel those depositions are important and material in our case. We are willing for counsel to put on his testimony, such as he wants, with the understanding that we can read those into the record later.

Mr. Hart: We have no more testimony. Mr. Lothrop's testimony, taken out of order, and Mr. Anderson's examination while he was on the stand for the plaintiff constitutes our case.

Mr. Robbins: Are you willing, Mr. Hart, that we can read those depositions in later when they are found?

Mr. Hart: Why, of course, I have no objection to whatever course the court sees fit to pursue in reference to them.

Court: What do those depositions relate to?

Mr. Robbins: They relate to the origin of the shipments and the original documents, as I understand.

Court: The shipment is conceded.

Mr. Robbins: Yes, that is true in a way, your honor, but as I understand it—I have not seen those depositions, but as I am informed, the original shipping documents are set forth in them, showing the consignor and all these different things which of course are practically admitted. If counsel is not going to put in any more testimony, I would like to call Mr. French for a moment if I may.

Court: Very well.

S. J. H. French, recalled for the plaintiff.

Direct Examination.

Questions by Mr. Robbins:

Mr. French, you have heard the testimony here in regard to Item 200 not applying where there is no differential mentioned there?

Court: Isn't this matter that this witness has gone over before?

Mr. Robbins: He didn't make it as clear—I want to hear what his explanation is of their new matter that they have injected into the case.

Mr. Hart: I examined Mr. French exhaustively on that subject, brought out what my theory was with Mr. French, so he could have a chance and you could have a chance.

Mr. Robbins: I know; but since then you have put some witnesses on who have taken an entirely

different turn in the matter. I want to know what his explanation is.

A. Well, Item 200, page 24, of this Joint Live Stock Tariff No. 100-A refers to the application of the differentials and the routing where those differentials are indicated. Now, I don't think it is clearly understood as to what the differentials are. A differential is an arbitrary rate or a lower rate than a local rate, and used as a factor for making a through rate. Now, if it was the intention to apply the Amarillo rate through from Hereford via all lines party to this tariff, they would have published the through rate to Hereford.

Mr. Hart: I think it is not right that the witness should be allowed to argue the case and argue as to his idea of the tariff at such length. We have already taken a good deal of testimony on both sides, and Mr. Lothrop is gone—I am not in shape to make a counter-argument. The court has been advised as to the tariffs. It does not seem to me quite fair to permit Mr. French to now engage in a new argument as to purely his idea of what the carriers might do if they wanted to change the situation.

Court: He is trying to explain why the matter stands as it does now. I will hear the testimony.

A. Consequently, it was necessary to show these differentials as they have shown them in part 1 of the tariff. But that is only a section or a part of



this tariff, which cannot be used in and of itself, except in conjunction with the rates provided in section 2 of the tariff. Now, to refer to these differentials, as also the diagram on page 57, there are through rates from Pecos & Northern Texas points to Canadian Pacific points, to C. B. & Q. points, to C. M. & St. P. points, and to all those points where the numerals are shown in the diagram on that page. Consequently, the rates as authorized by that section would apply in conjunction with those lines or to points on those lines. But there were some lines, such as the Oregon Short Line in this particular routing, or take the lines just above, the Kansas City, Mexican & Orient there are blank spaces there to C. B. & Q. points, and C. St. P. M. & O. points and Great Northern points, and to numerous other points. Now, if you construe this tariff to apply the Amarillo rate from Hereford to Oregon Short Line points, then you make void every numeral on this diagram, page 57, because the blank spaces, then, would indicate nothing.

Court: Tell me what those numerals represent.

A. Those numerals represent the routing by the respective lines party to the tariff. For instance, this Pecos & Northern Railroad shows through rates to Northern Pacific points, and 78 is the route. Now, you turn to route 78 on page 62, and you find here the routing by Amarillo, Texas, Fort Worth &

Denver City. See route 28. Now turn back to route 28, and it says, "Denver, Colorado, C. B. & Q. R. R., Billings, Mont." And there are also other routes. Pecos & Northern Texas Railway to points on the C. M. & P. S. Railway, Route 71, which shows on page 62, via "Amarillo, Texas, So. K. Ry. of Tex.—A. T. & S. F. Ry. See Route 6!" And Route 6 on page 58 says, "Via Kansas City, Mo., C. B. & Q. R. R., Council Bluffs, Ia., C. M. & St. P. Ry." etc. Now, the C. M. & St. P. apparently was agreeable to through rates from Hereford by that line. So was the C. B. & Q. So were the other lines as specified by those numerals on that diagram on page 57. But the Oregon Short Line was not agreeable to that, because there is a blank space shown, and you cannot take section 1 of the tariff without considering section 2 of the tariff, and the application, which is the key to any tariff printed, which by Item 360 plainly states that "Where route number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in section No. 3." Now, that is my explanation of the differential.

#### Cross Examination.

##### Questions by Mr. Hart:

Have you given a good deal of study to it, Mr. French?

A. I have, to this tariff, Mr. Hart.

Q. It is a little bit involved, is it not?

A. It is.

Q. If you were engaged in constructing a tariff, I think you could probably make it quite considerably clearer?

A. Yes. And this tariff, having been printed five years ago, I should say it would have been printed clearer, or rather made clearer, if it were published today or recently.

Q. Yes. The absence of a route number there in that chart is in direct conflict with the explicit statement in section 1, that where no differentials are stated, the flat rate from the base point is to be applied?

A. If it were not for the clause "As indicated."

Q. Well, now, that is just the point, and I think that is very important. Well, it is this word "as indicated" that to your mind would cause one to refer to section 3?

A. In section 3 are miscellaneous rates—section 2.

Q. Section 3 is the routing, isn't it?

A. No, section 3, Mr. Hart, is the rates to miscellaneous points.

Q. Oh, no, section 3 is the routing and application.

A. No, here is section 3, you see. Section 3 is miscellaneous rates.

Q. All right, perhaps I am wrong.

A. Now, the application is on page 56, and the chart is on page 57.

Q. Well, let us get back to that again, then. What I want to get at is, that there is an apparent conflict between the failure to have a route number there evidencing any through rates, there is an apparent conflict between that and the earlier parts of the tariff, which apparently state the Amarillo rate from Hereford, or at least there would be such conflict, in your judgment, if it were not for the fact that the words—the Amarillo rates are to be applied “as indicated”—the words “as indicated” would mean to your mind that the indication was as shown on pages 56 to 69 of the tariff?

A. Yes, sir.

Q. Well, now, as a matter of fact, even though the Short Line and the Pecos & Northern had not undertaken to agree on through rates, it would be entirely possible for the carriers from Amarillo north to apply the Amarillo rate to Hereford, and make their own settlement with the Pecos & Northern Texas?

A. But that should show in the tariff. You see, you have got a blank space in your routing in your tariff there to O. S. L. points.

Q. Yes, but we are presuming that there is no arrangement between the Pecos & Northern and Oregon Short Line—they haven't any dealings with

one another, so far as through rates are concerned?

A. Yes.

Q. But, so far as shippers are concerned, the Oregon Short Line, and the Union Pacific, and the other lines from Amarillo north could properly say to the shipper, "We will make you a rate of \$116.50—the Amarillo rate. Of course, we will have to make some settlement with the Pecos & Northern covering the transportation service they perform, but, so far as the shipper is concerned, we will give you \$116.50"?

A. But you couldn't have that rate without it was published and lawfully filed with the commission, Mr. Hart.

Q. But if they stated in the tariff that the Hereford rate—that the Amarillo rate applied to Hereford?

A. Yes; if they stated in the tariff.

Q. Yes. Then the shipper would be entitled to it, even though there was no through rate indicated?

A. Oh, if it were stated in the tariff, I will concede that.

Q. Yes.

A. But it is not stated in the tariff.

Q. All right. Let me ask you this: Supposing this explanatory note preceding section 1 read this wise: "Where no differentials are shown the Amarillo rates as shown in section 2 are to be applied,"



the words "as indicated" being left out—supposing they were left out, and there was just the flat statement that where no differentials were shown in this section 1, then the Amarillo rate was to be applied?

A. Well, then, I could not reconcile that note with the application on page 56 of the tariff and the key or chart on page 57.

Q. There would be a conflict?

A. There would be a conflict there.

Q. And there being a conflict or ambiguity, it would be perfectly proper to give the shipper the benefit of the doubt and the lower rate?

A. Well, I cannot quite concede that there is a conflict in the tariff as it applies now.

Q. I know, you say the words "as indicated" take it up?

A. "As indicated" meets the doubt—it qualifies the provision of the first section of the tariff. It is merely a preface to the first section of the tariff. Then you take the second section of the tariff, which shows your rate from Amarillo to these Oregon Short Line points.

Q. Well, then, Mr. French, why do you think it was thought necessary, when they were preparing this language for section 1, and they were talking about stations which had a differential over Amarillo, why do you suppose it was necessary to say that those differentials could be enjoyed, or were

to be used, in making through rates where application and routing is provided on pages 56 to 69?

A. Because the C. M. & St. P. and the C. B. & Q. and the D. & R. G. were agreeable to it, and the rates there are provided by the numerals on page 57

Q. All right. Then if it was necessary to make that reference when you were talking about stations which had a differential which did not take the Amarillo rate—if it was necessary to make that reference concerning those stations, why wasn't it equally necessary to make that reference when you were talking about stations which took the Amarillo rate, which did not have a differential?

A. Because, Mr. Hart, some of the lines—the C. B. & Q., for instance, and the C. M. & St. P. will apply the Amarillo rate from Hereford; they will also apply the \$8.80 differential, to make the through rate to points on the C. M. & St. P. from Abernathy, because there is routing on the chart on page 57 by those lines. But the Oregon Short Line will not join in the application of the Amarillo rate from Hereford, because it expressly provides, on page 57 in the chart, that there is no routing provided there.

Q. Yes, but when it expressly states in this tariff that the rates from the Amarillo group are a certain figure, and that Hereford is in that Amarillo group, and then says that those rates are to be applied as indicated, you think those words "as

indicated" should send a man elsewhere in the tariff to find out whether they are there or not?

A. I certainly do, because, Mr. Hart, if a shipment moved by the C. M. & St. P. to Butte, say, or to some point on that line, the \$125 rate the Amarillo rate to Butte, would apply through from Hereford by the C. M. & St. P., and from Abernathy the \$8.80 rate, or the arbitrary up to Amarillo, would apply from Abernathy through, plus the \$125 rate to Butte. But the Hereford rate is not authorized through, or rather the Amarillo rate is not authorized through from Hereford via the Oregon Short Line, and will not apply to points on that line.

Q. You get back to the one proposition that, because the words "as indicated" follow there, it is necessary then to consult the rest of the tariff?

A. In conjunction with the application on page 56, and the same—practically the same rule in the preface to division 2, or section 2 of the tariff.

Q. Well, that refers you right back to section 1, to this same item, does it not?

A. The two work together, which, in conjunction with the application on page 56, are to be used, and the application on page 56 is very specific. It says that the rates will not apply where there is no routing and no rating provided.

Q. Yes, so that if we had that alone we would have no trouble. If we had that statement alone, we would understand it clearly, if that stood alone?

A. But you have got routings and you have got through rates to points where they are authorized, but not to O. S. L. points.

Q. We get back right to the same proposition, that if there was a flat rate provided there, and the explicit statement that the Amarillo rate was to be applied from Hereford, that would govern, even though there wasn't any route number listed?

A. If it was the intention of all lines to join in the through rate from Hereford, it would have said the Amarillo rate applies through from Hereford; but three-quarters of the lines, or the majority of the lines in that tariff apparently were agreeable to the Amarillo rate through from Hereford; but the other lines where, the blank spaces are shown, were not agreeable, therefore they had to provide, by application in section 1, of the tariff, certain differentials.

Q. You are giving us your idea of the intention of the framer of this tariff, but you will concede—

A. And it is as the tariff reads, Mr. Hart.

Q. Yes, but you will concede, I presume, that any one might readily construe it in the manner I have been contending for here? That is a probable construction?

A. Well, if you were general freight agent of the Oregon Short Line, you would not so construe it. You would hate to have the interstate commerce



inspector drop down on you, and say "What is your authority for that rate?"

Q. Didn't the general freight agent of the Oregon Short Line, Mr. J. A. Reeves, so construe it?

A. Not personally, sir.

Q. The letter was addressed to him personally.

A. There are numerous clerks that will sign the name of the general freight agent when he has not seen the communication.

Q. You are indulging in pure speculation, Mr. French, when you say that?

A. That is true.

Q. The fact is Mr. Reeves, general freight agent, was addressed personally on this, and that subsequently to that letter and to a reference to this tariff made thus to him, a refund was made which recognized that Hereford-Amarillo proposition?

A. But it was a mistake, Mr. Hart, under that tariff.

Q. That is your idea?

A. Yes, and I think the tariff shows for itself that that was a mistake.

Q. In other words, you think it would not be safe for any shipper to undertake to find out what the rate is, unless he read the tariff from cover to cover? Is that the fact?

A. You know about the tariffs—

Q. Is that the fact, Mr. French?



A. The first thing a shipper must do is to turn to the application of the tariff.

Q. I ask you if it is a fact that in getting at the rate the shipper is not warranted in resting when he finds his combination and his rate, but he must read the entire tariff to see whether there is some other application or some other limitation?

A. The law charges the shipper with knowledge of the rate.

Q. Yes, you have produced here, as your evidence of this local rate from Hereford to Amarillo and Abernathy to Amarillo, you have produced certain sheets which were taken from the tariffs. Have you given us the tariffs so that we may know whether or not there are any limitations, or exceptions, or provisions in the rest of those tariffs which limit, or change, or alter in any way that local rate?

A. Well, we have extracts of the tariff that was in operation at the time from the Interstate Commerce Commission, and certified to.

Q. Yes, well now, supposing we got an extract of section 1 and section 2 from this exhibit 1, we could show the rate clearly without the limitation that you are contending for.

A. Well, now, you know that between points locally in Texas there is a state commissioner, and that those mileage rates between those two points are the rates. I think you will concede that \$39.60

from Abernathy and \$26.40 from Hereford are the local rates to Amarillo.

Q. I don't know anything about the Texas rates.

A. Well, you cannot controvert them.

Q. I am only trying to make it clear that there is, to say the least, a very great conflict and ambiguity in this tariff.

A. Well, I think I have explained the differentiating feature in that tariff in connection with those differentials, and that is, that where the rates are authorized through to points on the lines party to that tariff, the diagram on page 57 plainly shows it, and the rates and all the junction points, and where the rates are not shown there is a blank space, and there are almost as many blank spaces in the tariff as there are numerals.

Q. That is not quite accurate; but at least it is quite clear, in the use of its differentials, you are given specific reference to the chart and to the routing?

A. Yes.

Q. And when you are looking for the rates from stations which take no differentials, you are given no such reference?

A. If I were to construe the tariff the way you do, I would void the chart on page 57 of the tariff, which you cannot do lawfully.

Q. I don't see that. That is not quite clear to

me, but perhaps it is clear to the court. You certainly would use the chart so far as differentials are concerned, wouldn't you?

A. Not to points on the Oregon Short Line.

Q. You have your explicit statement that where differentials are shown they are to be used in connection with these route numbers, and you haven't any such statement as to stations which take no such differential?

A. But the blank shows that there is no routing from the points taking the differentials.

Q. I am talking about the reference which is made in the beginning of this tariff, this section 1, this grouping.

A. I thought you were referring to page 57.

Q. I am talking about the reference in section 1, where the grouping and the common point rates are stated, and that reference, so far as differentials are concerned, tells you to go to 56-69, tells you when you are figuring on those differentials you must take into consideration 56 to 69, take into consideration the route numbers and the absence of route numbers?

A. True.

Q. On the other hand, when you are considering the rates from points which take the same rate as Amarillo, where there is no differential, you are given no such reference? Now, that is true, is it not?

A. You are given no such reference because the rates do not apply to those points where there is no such reference.

Q. Although they say on their face that they do?

A. Well, I cannot concede the tariff is applicable the way you see it; and I think I have made plain the fact that those differentials, as shown in section 1, are made to apply only to the lines that agree to it and as shown in the routings, and the rates do not apply where there is no authority on page 57.

Mr. Hart: That is all.

Examination by the Court.

Q. You spoke about the inspector dropping down upon you. Have you had any inspector?

Mr. Hart: Your honor understands Mr. French is a local man, is with the O.-W. R. & N. here, and is not a Short Line man at all.

A. For your information, I once had an interstate—

Mr. Hart: Never mind, Mr. French, if you are not going to discuss this case.

A. I was just going to say to the court that an interstate commerce inspector—

Court: What I wanted to get at was whether or not you had ever had a special inspector construe this situation.

A. Oh, this particular tariff, no, sir; no.

Q. Now, Mr. French, why do you not apply the differentials to Abernathy, instead of the \$39.60 rate?

A. Because, sir, Abernathy is a point on the Pecos & Northern Texas Railroad, and there is no routing provided on page 57 from points on the Pecos & Northern Texas Railroad to points on the Oregon Short Line; consequently the only basis would be the local rate of \$39.60 from Abernathy to Amarillo plus the \$116.50 rate to Pocatello, \$118.50 to Monida, or \$125 rate to Dillon.

Court: I see your position now.

Excused.

Court: Is that all the evidence you have except those depositions?

Mr. Robbins: Yes, except the depositions.

Court: I can adjourn this case until some day next week, and you can get those depositions here in the meantime. I doubt very much whether you have much to show in your depositions.

Mr. Robbins: Well, I don't know, myself, your honor, until I see them.

Adjourned until Friday, April 27, at which time a further adjournment was taken to May 14, 1917.

Portland, Oregon, May 14, 1917. 2 P. M.

Mr. Robbins: If the court pleases, in these two



cases of the *O. S. L. v. Portland Cattle Loan and Cattle Feeder Companies*, as your honor knows, we stipulated to take depositions at Amarillo. Now, our information is that those depositions were taken, but we have been unable to locate them, and I have entered into a verbal stipulation with Mr. Hart that we may read the copies of these depositions; that is, not the copy, but they were rewritten, the original depositions which were taken at Amarillo. But I find that a number of the original exhibits were attached to those depositions, so I will be unable to produce them at this time. However, we desire to offer in evidence these depositions as they are here today.

The first deposition I desire to offer is in the Feeder case.

Counsel has suggested that it is a waste of time for us to read these. Your honor will probably want to refer to them and read them anyway; and I think it would be much better, probably, if we would not take up the time to read them.

Court: Well, introduce them.

Mr. Robbins: We will offer in evidence, then, depositions in the Portland Feeder case, starting out with E. M. Jones, and the rest of these that are fastened together. And also in the Portland Cattle Loan case.

Now, I notice an exhibit attached to each one

of these, which I take it is the record of the feed yard man down there. We would like to offer those in evidence. I understand they are merely marked for identification.

Mr. Hart: Mr. Robbins correctly states our understanding that these may be treated as if they were the transcripts of the testimony originally taken. But, of course, with that concession, I want to reserve the right to make all the objections which are noted in the depositions themselves.

Court: How about those exhibits?

Mr. Robbins: Well, of course, if those exhibits come, your honor, we would like to offer them in evidence. But I firmly believe that the man who took those depositions did not extend them—what has become of them I don't know—because myself, as well as Mr. Hart's people, have tried to locate them. But I am not through yet—I am going to hunt this thing up, and run it down, because I am not satisfied with the treatment I got at Amarillo. If necessary, I am going to send a man down there to see what became of these depositions. If I discover them at a reasonable time, I would like the privilege of offering them in this case—that is, the exhibits out of those.

Court: Do you object to that if they get here in time?

Mr. Hart: Of course, I am on the slow side of

the case, your honor. I don't care how much time he takes. I do want to take advantage of any failure of proof which Mr. Robbins may encounter, because, as I said before, these are cases in which the claims made are inequitable as between the contracting parties. The necessity for bringing the suits arose out of the obligation to enforce the Interstate Commerce law as the Short Line Company conceives that obligation. At the same time, from the fact that so much actual injustice results from any such late enforcement of their alleged construction of the tariffs, I would be remiss in my duty to my client if I did not take advantage of every means possible to defeat the claims.

Court: You want to submit the case at this time?

Mr. Hart: Yes.

Court: Well, you may submit the case, and if the exhibits come, you can apply to the court for leave to introduce those exhibits, and of course the other party will have notice of that, and you can test that out at that time.

Mr. Robbins: I intend to try to get them. In fact, I am trying to do it now. That is all we have.

Mr. Hart: That is all we have.

---

And afterwards, to-wit: on the.....day of  
....., 1917, there was duly filed in said

court a stipulation in words and figures as follows,  
to-wit:

STIPULATION.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a cor-  
poration,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,

Defendant.

No. 7233

PLAINTIFF'S EXHIBIT No. 1.

Only two Supplements to this Tariff will be in  
effect at any time.

I. C. C. No. 265.

Cancels I. C. C. No. 214.

JOINT LIVE STOCK TARIFF NO. 100-A.

Cancels Joint Live Stock Tariff No. 100

Naming Local, Joint and Proportional Rates  
on

RANGE CATTLE, ALSO HORSES

When Part of a Shipment of Range Cattle and Ac-  
companying Same

From Stations in

Arizona, Colorado, Kansas, New Mexico, Okla-  
homa and Texas,

Also Stations in the Republic of Mexico

To Stations in

Colorado, Iowa, Idaho, Montana, Nebraska, North  
Dakota, South Dakota, Washington and Wyoming.

Also Stations in the Dominion of Canada.

Issued March 26, 1912.      Effective May 2, 1912.

Issued by W. A. Poteet, Agent,

Kansas City, Mo.

J. D. H. Co.—3,500

Page 4 of the Exhibit

Index to Points of Origin

See Item No. 5.

Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*
Abernathy	Tex.		P. & N. T. Ry.				120	
*	*	*	*	*	*	*	*	*
Amarillo	Tex.		S. K. Ry. of T.				186	
*	*	*	*	*	*	*	*	*

Page 5 of the Exhibit

Index to Points of Origin—Con.

*	*	*	*	*	*	*	*	*
Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*
Hereford	Tex.		P. & N. T. Ry.				98, *255	
*	*	*	*	*	*	*	*	*

\*Refers to Item Numbers of Miscellaneous Rates.



Page 9 of the Exhibit  
Index to Points of Destination  
See Item No. 5.

Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*

---

Page 11 of the Exhibit  
Index to Points of Destination—Con.

Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*
Dillon	Mont.		O. S. L.			2060		
*	*	*	*	*	*	*	*	*

---

Page 12 of the Exhibit  
Index to Points of Destination—Con.

Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*
Idaho Falls	Ida		O. S. L.			2050		
*	*	*	*	*	*	*	*	*

---

Page 14 of the Exhibit  
Index to Points of Destination—Con.

Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*
Monida	Mont.		O. S. L.			2055		
*	*	*	*	*	*	*	*	*

---

Page 18 of the Exhibit.

Item            Intermediate Application  
No.

*Application of Rates from and to Intermediate Points.*

Will not apply in connection with rates shown in  
 5 Section 3, pages 52 to 55 inc.

To a point of destination not named in Section 2 of this Tariff but which is directly between two points to which specific rates are named, in such section, the rate to apply will be the rate to the more distant of the two points between which the intermediate point is located; routing to be the same as applies to the more distant point.

From a point of origin not named in Section No. 1 of this Tariff but which is directly between two points from which specific rates are named in such section, the rate to apply will be the rate from the more distant of the two points between which the intermediate point is located; routing to be the same as applies from the more distant point.

\* \* \* \* \*

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Page 24 of the Exhibit

Section No. 1.

Item 200—Governing use of differentials shown in  
 Section No. 1, pages 24-31 inclusive.

The differentials shown in Section No. 1 are to be added to or deducted from the Amarillo, El Paso

or Deming rates as shown in Section No. 2 hereof, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69.

Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated.

---

Page 26 of the Exhibit

Section No. 1.

Basis from Points of Origin for Rates on Range  
Cattle, Also Horses (See Items 10 and 200)

In Dollars and Cents per 36 $\frac{1}{2}$  Foot Car

## THE PECOS RIVER RAILROAD CO.

Index No.	From Stations.	Amarillo, Add. Deduct.	Index No.	From Stations.	Amarillo, Add. Deduct.
79	Angeles, Tex.	\$25.00 .....	83	Arno, Tex.	\$28.50 .....
80	Orla, "	25.00 .....	84	Patrole, "	28.50 .....
81	Riverton, "	25.00 .....	85	Pecos, "	28.50 .....
82	Dixieland, "	28.50 .....			

## THE PECOS &amp; NORTHERN TEXAS RY. CO.

Index No.	From Stations.	Rate Basis.	Index No.	From Stations.	Amarillo, Add. Deduct.
90	Zita,	Tex. Amarillo.	125	Burris, Tex.	\$15.40 .....
91	Haney,	" "	126	Posey, "	15.40 .....
92	Canyon,	" "	127	Slayton, "	16.50 .....
93	Canyon Jct.,	" "	128	Slayton Jct. "	17.60 .....
94	Lester,	" "	(R) 129	Southland, "	17.60 .....
95	Umbarger,	" "	(R) 130	Buenos, "	17.60 .....
96	Dawn,	" "	(R) 131	Dugger, "	18.70 .....
97	Joel,	" "	(R) 132	Post St Yds., "	18.70 .....
98	Hereford,	" "	(R) 133	Post, "	18.70 .....
99	Summerfield,	" "	(R) 134	Augustus, "	19.80 .....
100	Black,	" "	(R) 135	Justiceburg, "	20.90 .....
101	Friona,	" "	(R) 136	Justiceburg	
102	Parmerton,	" "		Stk Yds., "	20.90 .....
103	Bovina,	" "	(R) 137	Sand Creek	
104	Wilsey,	" "		Spur, "	22.00 .....
Index No.	From Stations.	Amarillo, Add. Deduct.	(R) 138	Eppler, "	22.00 .....
105	Farwell, N. M.	\$ 2.75 .....	(R) 139	Fullerville, "	23.10 .....
Index No.	From Stations.	Rate Basis.	(R) 140	Dermott, "	23.10 .....
106	Hutson,	Tex. Amarillo.	(R) 141	Brand, "	24.20 .....
107	Ralph,	" "	(R) 142	Snyder, "	24.20 .....
108	Happy,	" "	(R) 143	Chorn, "	25.00 .....
109	Kaffir,	" "	(R) 144	Hermleigh, "	25.00 .....
110	Tulia,	" "	(R) 145	Pyron, "	25.00 .....
111	Eunice,	" "	(R) 146	Bernecker, "	25.00 .....
112	Kress,	" "	(R) 147	Gannon, "	25.00 .....
113	Finney,	" "	(R) 148	Sweetwater	
114	Plainview,	" "		Jct., "	25.00 .....
Index No.	From Stations.	Amarillo, Add. Deduct.	(R) 149	Sweetwater,	25.00 .....
115	Plainview Jct., Tex.	\$ 4.40 .....	(R) 150	Lider, "	4.40 .....
116	Ferguson,	" 4.40 .....	(R) 151	Aiken, "	6.60 .....
117	Hale Center,	" 4.40 .....	152	Lockney, "	8.00 .....
118	Swastika,	" 4.40 .....	153	Muncy, "	10.20 .....
119	Aley,	" 8.80 .....	154	Floydada, "	11.00 .....
120	Abernathy,	" 8.80 .....	155	Lofton, "	18.70 .....
121	Monroe,	" 14.30 .....	156	Wilson, "	18.70 .....
122	Lubbock St. Yds.,	" 14.30 .....	157	Dune, "	19.80 .....
123	Lubbock Jct.,	" 14.30 .....	158	Tahoka, "	19.80 .....
124	Lubbock,	" 14.30 .....	159	Skeen, "	21.00 .....
			160	O'Donnell, "	22.10 .....
			161	Hindman, "	23.20 .....
			162	Arvana, "	23.20 .....
			163	Lamesa, "	23.20 .....

(R) Indicates reduced rates.

Page 32 of the Exhibit

Section No. 2.

Rates from Amarillo, El Paso-Deming Groups.  
Item 205.

The rates shown in Section No. 2, in columns headed "Amarillo" and "El Paso-Deming," are to be applied from stations shown in Section No. 1, as taking Amarillo or El Paso-Deming Rate Basis or same are to be used as a basis for arriving at through rates from stations shown in Section No. 1 as taking differentials OVER or UNDER Amarillo or El Paso-Deming rates, where application and routing is provided on pages 56 to 69 inc. from such point of origin to the destination station.

See also item 200, page 24.

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Page 50 of the Exhibit

Section No. 2.

Rates on Range Cattle, Also Horses (See Item 10  
also 205, page 32.) In Dollars and Cents  
Per 36½ Foot Car.



## NORTHERN PACIFIC RAILWAY—Continued.

Index No.	To Stations.	From Amarillo Group.		From El Paso-Deming Group.	
		In Lots of Less Than 10 Cars.	In Lots of 10 Cars or More.	In Lots of Less Than 10 Cars.	In Lots of 10 Cars or More.
2013	Whitehall, Mont.	\$130.00	\$125.00	\$158.50	\$153.50
2014	Twin Bridges, "	130.00	125.00	158.50	153.50
2015	Sheridan, "	130.00	125.00	158.50	153.50
2016	Alder, "	130.00	125.00	158.50	153.50
2017	Toston, "	130.00	125.00	158.50	153.50
2018	Townsend, "	130.00	125.00	158.50	153.50
2019	Helena, "	130.00	125.00	158.50	153.50
2019-A	Willow Creek, "	130.00	125.00	158.50	153.50
2019-B	*Sappington, "	130.00	125.00	158.50	153.50
2019-C	Cardwell, "	130.00	125.00	158.50	153.50
2019-D	Deer Lodge, "	135.00	130.00	163.50	158.50
2019-E	*Kohrs, "	135.00	130.00	163.50	158.50
2019-F	Garrison, "	135.00	130.00	163.50	158.50
2020	Drummond, "	135.00	130.00	163.50	158.50
2021	Missoula, "	142.00	137.00	170.50	165.50

## OREGON SHORT LINE R. R.

Index No.	To Stations.	From Amarillo Group.		From El Paso-Deming Group.	
		In Lots of Less Than 10 Cars.	In Lots of 10 Cars or More.	In Lots of Less Than 10 Cars.	In Lots of 10 Cars or More.
2050	Idaho Falls, Ida.	\$121.50	\$116.50	\$150.00	\$145.00
2051	Market Lake, "	121.50	116.50	150.00	145.00
2052	*Camas, "	121.50	116.50	150.00	145.00
2053	Dubois, "	121.50	116.50	150.00	145.00
2054	Spencer, "	123.50	118.50	152.00	147.00
2055	Monida, Mont.	123.50	118.50	152.00	147.00
2056	Lima, "	126.00	121.00	154.50	149.50
2057	Red Rock, "	126.00	121.00	154.50	149.50
2058	*Barratts, "	130.00	125.00	158.50	153.50
2059	*Dalys, "	130.00	125.00	158.50	153.50
2060	Dillon, "	130.00	125.00	158.50	153.50

## UNION PACIFIC R. R.

Index No.	To Stations.	From Groups Amarillo. El Paso-Deming.		Index No.	To Stations.	From Groups Amarillo. El Paso-Deming.	
2065	Cheyenne, Wyo.	\$ 75.00	\$103.50	2079	*Slade, Neb.	.....	\$118.50
2066	Egbert, "	75.00	103.50	2080	*Dexter, "	.....	118.50
2067	Pine Bluffs, "	75.00	103.50	2081	Sutherland, "	.....	118.50
2068	Rawlins, "	† 93.50	118.50	2082	*O'Fallons, "	.....	118.50
2069	Rock Springs, "	113.50	142.00	2083	Hershey, "	.....	118.50
2070	*Barton, Neb.	.....	118.50	2084	*Nichols, "	.....	118.50
2071	Big Springs, "	.....	118.50	2085	Birdwood, "	.....	118.50
2072	*Megeath, "	.....	118.50	2086	*Pallas, "	.....	118.50
2073	Brule, "	.....	118.50	2087	North Platte, "	.....	118.50
2074	*Plano, "	.....	118.50	2088	*Gannett, "	.....	118.50
2075	Ogallala, "	.....	118.50	2089	*Keith, "	.....	118.50
2076	*Roscoe, "	.....	118.50	2090	Maxwell, "	.....	118.50
2077	*Korty, "	.....	118.50	2091	*Hindry, "	.....	118.50
2078	Paxton, "	.....	118.50	2092	Brady Island, "	.....	118.50

\*No agent. Freight must be prepaid. †Indicates advanced rates.

## Page 50 of the Exhibit (Continued)

†From Haney, Tex., Index No. 91 and Canyon, Tex., Index No. 92 and from stations Texline, Tex., Index No. 375 to Estelline, Index No. 408, inclusive, rate will be \$88.50 per 36½ foot car.

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## Page 56 of the Exhibit

## Application of Rates

Where routing is shown in this Tariff, it is that ordinarily and customarily to be used, and should be strictly observed by Agents. If, from any cause shipments are routed by carriers via junction points other than those designated, but over the lines of carriers parties to this Tariff, the rate published herein will apply.

NOTE.—Where application of any rate is limited to route via certain carriers, this provision is not intended to authorize application of such rate via or in connection with a competing route or carrier, nor does it cover cases where shippers route shipments contrary to provisions of Tariff.

---

Rates provided herein from points of origin shown in Section No. 1 to points of destination shown in Section No. 2, will apply only via the routes indicated in chart on page 57, except as provided in Item 350.

NOTE 1.—Where Route Number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in Section No. 3.

(See also Item 350.)

NOTE 2.—The insertion of a route number is not to be construed as indicating that rates named will apply from all points on the originating line to all points on the destination line via any or all intermediate lines. The data shown on pages 58 to 69 inclusive opposite the route number indicated specifically describes the points of origin, the routes and the points of destination.



## STIPULATION.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,

Defendant.

No. 7233.

The parties stipulate that the foregoing sheets numbered 2 to 16 inclusive and described as pages 1, 4, 5, 9, 11, 12, 14, 18, 24, 26, 32, 50, 56 and 57 of Plaintiff's Exhibit 1 in this action are true and correct excerpts from Plaintiff's Exhibit 1. The parties further stipulate that said excerpts contain all of the said Exhibit 1 applicable to the transportation of the shipments described in the complaint in this action and necessary for the determination of the duly filed and published tariff rate properly to be charged for said shipments.

Dated November 23 1917.

W. A. Robbins,

Attorney for Plaintiff.

Carey & Kerr,

Charles A. Hart,

Attorneys for Defendant.



STIPULATION.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,

Defendant.

No. 7233.

The parties hereto stipulate that the annexed copy of portions of Plaintiff's Exhibit 1 in this action shall constitute and be a part of the bill of exceptions duly settled and allowed herein and that said copy of portions of said exhibit shall be considered and used as Plaintiff's Exhibit 1 and as a part of the record in this cause, and that it shall not be necessary to include in the printed record herein the whole of said Plaintiff's Exhibit 1. The parties further stipulate that said Exhibit 1 may be forwarded with the record herein to the Circuit Court of Appeals for the Ninth Circuit upon defendant's writ of error, but that the annexed copy of portions of said exhibit may be used instead of the exhibit in making up the record herein.

Dated November 23, 1917.

W. A. Robbins,

Attorney for Plaintiff.

Carey & Kerr,

Charles A. Hart,

Attorneys for Defendant.

And afterwards, to-wit, on the 8th day of November, 1917, there was duly filed in said court a petition for writ of error in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,

Defendant.

Portland Cattle Loan Company, a corporation, the defendant above named, conceiving itself aggrieved by the order made and the judgment entered thereon in this proceeding on the 29th day of September, 1917, and by the rulings made in this action as will appear from the assignment of errors filed herewith, and whereby it was adjudged that plaintiff have and recover from defendant the sum of one thousand seventy-seven and seventy hundredths dollars (\$1,077.70) together with its costs and disbursements incurred in said action, comes now and petitions said court for an order allowing it, said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided for the cor-

rection of the error so complained of, and also for an order fixing the amount of the supersedeas bond which the defendant shall give and furnish upon said writ of error, and that upon the giving of such bond all further proceedings in this court be suspended, stayed, and superseded until the determination of such writ of error by the United States Circuit Court of Appeals in and for said Ninth Circuit. And your petitioner will ever pray, et cetera.

Carey & Kerr,

Charles A. Hart,

Attorneys for Defendant.

---

And afterwards, to-wit, on the 8th day of November, 1917, there was duly filed in said court assignments of error, in words and figures as follows, to-wit:

#### ASSIGNMENTS OF ERROR.

In the Circuit Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,

Defendant.

Comes now the above named defendant, Port-

land Cattle Loan Company, and makes and files the following assignments of error upon which it will rely upon its prosecution of a writ of error in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this honorable court made and entered on the 29th day of September, 1917.

The learned court erred as follows :

### I.

In overruling the defendant's motion for an order adopting and making findings of fact and conclusions of law determining that defendant is entitled to a dismissal of this action and for judgment for costs and its disbursements upon the ground that the tariffs of plaintiff and its connecting carriers attempted to be applied to the transportation of defendant's property were ambiguous and justified the freight charges actually collected prior to the commencement of the action.

### II.

In making and entering general findings for plaintiff herein, and in ordering and directing the entry of judgment in favor of plaintiff and against defendant, and in determining that the tariffs of plaintiff and its connecting carriers properly interpreted required the collection of the freight charges demanded by plaintiff and required the

entry of judgment against defendant for such freight charges.

Carey & Kerr,  
Charles A. Hart,  
Attorneys for Defendant.

---

And afterwards, to-wit, on the 8th day of November, 1917, the same being the fourth judicial day of the regular November term of said court, present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER ALLOWING WRIT OF ERROR AND  
FIXING BOND ON WRIT OF ERROR.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,

Defendant.

Upon motion of Charles A. Hart, one of the attorneys for defendant, Portland Cattle Loan Company, in the above entitled cause, and upon the filing of petition for writ of error and assignments of error heretofore filed herein;

It is hereby ordered that the writ of error as



prayed for in said petition be allowed, and that the amount of the supersedeas bond to be given by defendant, Portland Cattle Loan Company, upon said writ of error be and the same is hereby fixed at the sum of fifteen hundred dollars (\$1,500), and that upon the giving of said bond all further proceedings in this court be suspended, stayed, and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 8th day of November, 1917.

CHARLES E. WOLVERTON,  
Judge.

---

And afterwards, to-wit, on the 9th day of November, 1917, there was duly filed in said court a bond in words and figures as follows, to-wit:

**BOND ON WRIT OF ERROR.**

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,  
Defendant.

Know All Men by These Presents, That We,  
Portland Cattle Loan Company, a corporation, as

principal, and National Surety Company, a corporation duly organized under the laws of the state of New York, and duly qualified to do business within the state of Oregon, as surety, are held and firmly bound unto the plaintiff in the above entitled action in the sum of fifteen hundred dollars (\$1,500) for the payment of which well and truly to be made the undersigned bind themselves and each of them jointly and severally, and their successors, representatives, and assigns respectively, firmly by these presents.

Sealed with our seals and dated this 8th day of November, 1917.

Whereas, the above named defendant, Portland Cattle Loan Company, has sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit to reverse the judgment entered in the above entitled action in favor of plaintiff therein and against defendant for the sum of one thousand seventy-seven and seventy hundredths dollars (\$1,077.70) together with interest and costs.

Now, therefore, the condition of this obligation is such that if the above named Portland Cattle Loan Company, a corporation, shall prosecute such writ of error to effect and answer all damages and costs if it shall fail to make good said plea, then this obli-

gation shall be void; otherwise to remain in full force and effect.

PORTLAND CATTLE LOAN COMPANY,

By Carey & Kerr,

Charles A. Hart,

Its Attorneys.

NATIONAL SURETY COMPANY,

By J. C. Ainsworth,

(Corporate Seal) Resident Vice-President.

Attest: Clarence D. Porter,

Resident Assistant Secretary.

Countersigned at Portland, Oregon, November 8,  
1917,

NATIONAL SURETY COMPANY,

By Jas. McL. Wood & Co.,

Resident Agents.

Approvd this 9th day of November, 1917.

CHARLES E. WOLVERTON,

Judge.

STIPULATION.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,

Defendant.

The parties hereto stipulate that the foregoing record, pages 1 to 236, inclusive, is a true and correct copy of the record of this action in the District Court of the United States for the District of Oregon, and the clerk of said District Court of the United States for the District of Oregon may certify the same upon this stipulation as a true and correct copy of said record without comparison thereof with the original record in his office.

Dated December <sup>25</sup>~~24~~, 1917.

..... *L. C. Spencer* .....

..... *W. A. Robbins* .....

Attorneys for Plaintiff.

..... *Ray T. ...* .....

..... *Charles A. Hart* .....

Attorneys for Defendant.

CERTIFICATE OF CLERK OF UNITED STATES  
DISTRICT COURT TO TRANSCRIPT  
OF RECORD.

United States of America, District of Oregon—ss:

I, G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify in accordance with the foregoing stipulation of the parties and without comparison with the record, that the foregoing pages numbered 4 to 236, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of *Oregon Short Line Railroad Company*, plaintiff and defendant in error, against *Portland Cattle Loan Company*, defendant and plaintiff in error, as the same remain of record and on file in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland in said District this 21<sup>st</sup> day of December, 1917.

.....*G. H. Marsh*.....,

Clerk United States District Court,  
District of Oregon.



**United States Circuit Court  
of Appeals  
For the Ninth Circuit**

---

PORTLAND CATTLE LOAN COMPANY,  
A CORPORATION  
*Plaintiff in Error*

*vs.*

OREGON SHORT LINE RAILROAD COMPANY,  
A CORPORATION  
*Defendant in Error*

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**Brief for Plaintiff in Error**

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On Writ of Error to the District Court of the  
United States for the District of Oregon.

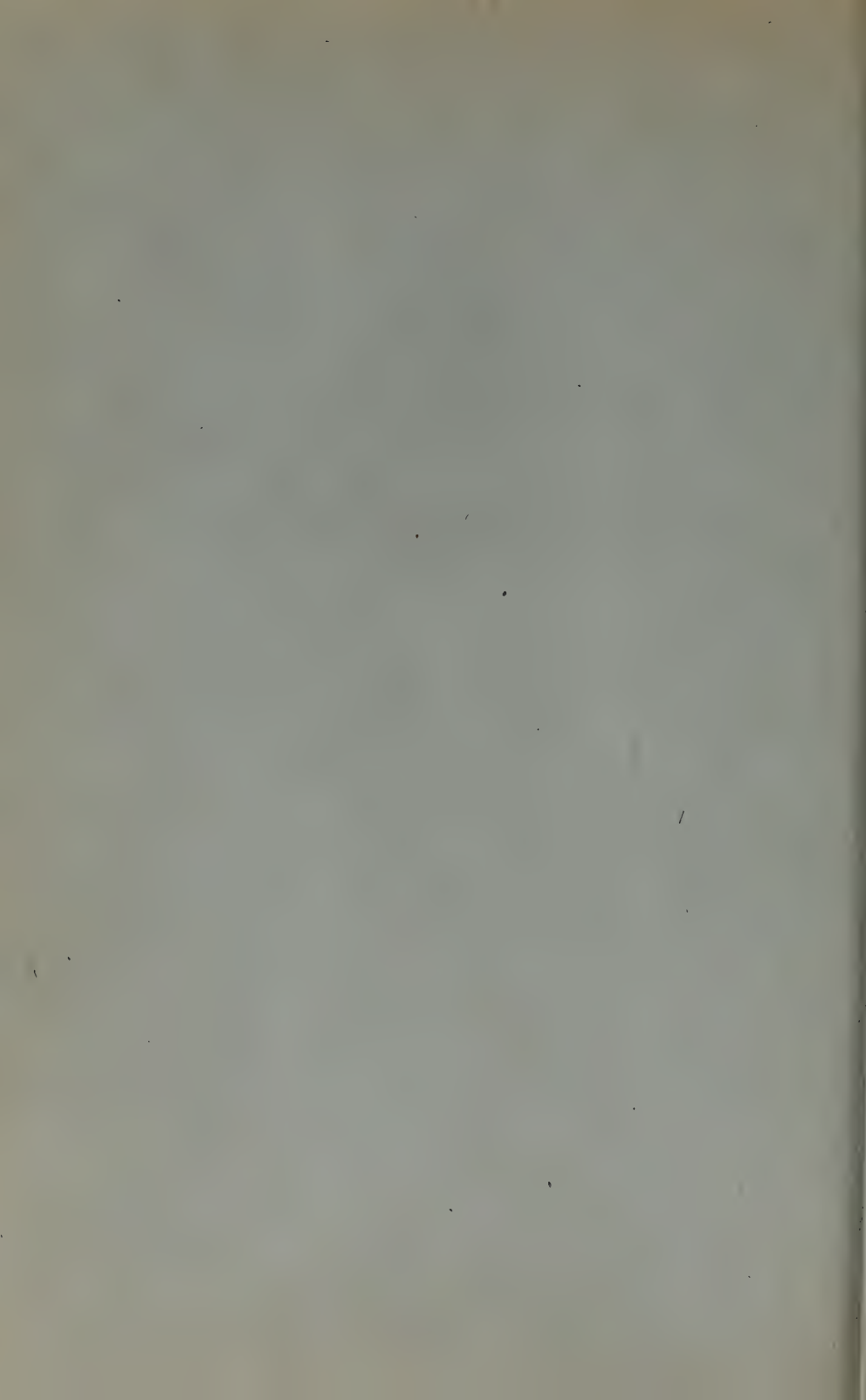
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CAREY AND KERR and  
CHARLES A. HART,

Yeon Building,  
Portland, Oregon,  
Attorneys for Plaintiff in Error.

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FILED  
FEB 4 - 1910



No. 3103

# United States Circuit Court of Appeals

For the Ninth Circuit

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PORTLAND CATTLE LOAN COMPANY,

A CORPORATION

*Plaintiff in Error*

*vs.*

OREGON SHORT LINE RAILROAD COMPANY,

A CORPORATION

*Defendant in Error*

---

## Brief for Plaintiff in Error

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On Writ of Error to the District Court of the  
United States for the District of Oregon.

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### STATEMENT OF THE CASE.

This action is one to recover a balance of freight charges claimed to be due for the transportation of a trainload of cattle from Hereford, Texas, to destinations in Idaho and Montana. Hereford is a station on the Pecos and Northern Texas Railway a short distance from Amarillo, which under the tariffs was a base point for rate-making. The ship-

ment moved through Amarillo and the dispute is over the claim of the railway company (asserted years after the shipment was handled) that the through rate from the base point, Amarillo, was not applicable from Hereford, and that an additional local rate of \$26.40 was collectible.

The shipment in question was made by A. G. Greenameyer to plaintiff in error as consignee in September, 1912. It consisted of 44 carloads of cattle (consolidated into 43 cars at Amarillo), 27 of which were delivered to the consignee at Pocatello, Idaho, and the remaining 16 at a station near Butte, Montana (Transcript, pp. 6, 7). The defendant in error, Oregon Short Line Railroad Company, was the delivering carrier, and upon bills rendered by it in October, 1912, payment of the freight charges was made by plaintiff in error. For the cattle which were delivered at Pocatello, a rate of \$136.50 per car was assessed. This was made up of two items—\$116.50 covering the transportation from Hereford to Idaho Falls, and \$20.00 (incorrectly collected, as later admitted) for the back haul from Idaho Falls to Pocatello (Transcript, pp. 98, 117, 118, 119, 173). The charges for the part of the shipment delivered at or near Butte were made up in the same way; that is, \$116.50 per car was charged from point of origin to Idaho Falls, and an added charge was made to cover the transportation from there to Butte (Transcript, p. 179).

The question in dispute here is whether the tariffs justified the charge of \$116.50 per car on the entire shipment from Hereford to the Idaho points; the carriers now contending that the \$116.50 rate was not applicable from Hereford, the point of origin of the shipments, but that a local charge of \$26.40 per car was and is collectible to cover the transportation from Hereford to Amarillo (Transcript of Record, p. 16). Plaintiff in error insists that the original construction given the tariffs is the correct one, and that there was ample tariff authority for applying the \$116.50 Amarillo rate to shipments originating at Hereford, and that no further charge is now properly assessable.

The shipment moved in September, 1912 (Transcript of Record, p. 6). Over two years later plaintiff in error opened correspondence with the General Freight Agent and with the Auditor of the Oregon Short Line Company (Transcript, p. 116), calling attention to the fact that the \$116.50 rate was applicable and complaining that on the cars delivered at Pocatello, Idaho, \$20.00 additional per car had been collected for the theoretical back haul from Idaho Falls (the destination point named in the tariff) to Pocatello. After some argument it was admitted that no higher rate was chargeable to Pocatello than to Idaho Falls, and a refund of \$20.00 per car on the 26 cars was made. (Transcript, pp. 119, 92.) Thus the \$116.50 from point of origin



was confirmed and "protected" by defendant in error almost two and one-half years after the shipment (Transcript, pp. 119, 92); and almost three years from the time of the shipment elapsed before any one connected with the transaction—the Oregon Short Line Company or any of its connecting carriers—advanced the claim that the tariffs forbade applying the \$116.50 Amarillo rate to Hereford shipments, and that a local charge of \$26.40 per car to cover the haul from Hereford to Amarillo was collectible (Transcript, pp. 111, 110).

The finding of the trial court was in favor of the construction of the tariff now advocated by the carriers and which required the collection of the local rate of \$26.40 per car (from Hereford to Amarillo) in addition to the through rate already paid. This writ of error challenges the finding so made.

## ASSIGNMENTS OF ERROR.

### I.

The court erred in overruling the motion of plaintiff in error for findings in its favor upon the ground that the tariffs of defendant in error and its connecting carriers authorized the rate originally collected and did not permit or require the subsequent collection of any additional charges.

### II.

The court erred in making and entering general findings for defendant in error and in holding and determining that the tariff of defendant in error and its connecting carriers authorized and required the collection from plaintiff in error of any freight charges for the transportation of its shipment in addition to those previously assessed and paid.

**ARGUMENT.**

The single question in this case is whether or not the tariffs of the railway company required the collection of a "local" charge for trainload shipments of cattle from Hereford to Amarillo in addition to the through rate from Texas points to Idaho points on the Oregon Short Line Railroad; to this question both assignments of error are addressed. Concededly the Interstate Commerce Act requires the carriers to collect and the shippers to pay whatever the duly filed and published tariffs say is the rate. *Texas & Pacific Railway Co. v. Mugg*, 202 U. S. 242. We are concerned, therefore, with the meaning of the railway tariffs applicable to the shipments of plaintiff in error; not necessarily the meaning which a careful judicial examination would arrive at, but the meaning which it may fairly be said was conveyed by its terms to interested shippers.

Railway tariffs are designed to fix rates which under all circumstances must be adhered to; and the tariffs are published for the purpose of advising shippers definitely and certainly what rates will apply to their shipments. If the tariffs are obscure or confused, or if they are ambiguous, the shipper is not required to guess at the meaning, at the risk of being called upon years later (perhaps long after he has settled with those to whom he may have sold the shipment) to pay an additional

freight charge, if his guess then be held incorrect. See *Old Dominion Co. v. Penn. Rd. Co.*, 17 I. C. C. R. 309, 312, in which the Commission said:

"Since, however, in the confusion of these tariffs there appears to have been reasonable ground for the contention of the consignee, and it further appearing that it paid the published rates on the basis of actual weights upon the cars loaded to their full space capacity, it would seem that we are justified, under the circumstances, in dismissing these complaints with the understanding that the defendant carriers are hereby authorized to waive or omit the collection of such unpaid charges on these shipments as are based upon assumed weights in excess of the actual weights of the shipment. . . . We cannot too plainly indicate that our action in these and other like cases arising under the conditions referred to must not be accepted as the basis of excuse for uncertain, conflicting and confusing tariff provisions, which must always give rise to discreditable conditions and practices such as are disclosed in this investigation."

That the tariff of the carriers applicable to the shipment of plaintiff in error is confusing and uncertain and difficult of interpretation is perhaps not open to question. There is a positive statement, apparently without reservation or limitation, that the Amarillo rate of \$116.50 per car is applicable to shipments from Hereford (Transcript, pp.

137, 139, 141) ; and later in the tariff there is a rule, discovered apparently for the first time almost three years after the shipment moved, that routing must be shown to permit the application of any through rates between points on the lines of the parties to the tariff (Transcript, p. 226). In this confusion of tariff authority, if there is "any reasonable ground" (to use the language of the Interstate Commerce Commission in the case quoted from, *supra*) for the construction of the tariff adopted and confirmed by the carriers and upon which rights of consignor, consignee and subsequent parties to transactions involving the commodity shipped have long since been settled, that construction should govern.

That there is such reasonable ground for the construction first given the tariff, plaintiff in error believes is clear, and we ask the court to consider (1) the language of the tariff applying definitely and without the limitations elsewhere stated as to other rates, the rate actually collected; (2) the weight of the testimony given by the tariff men on both sides as to what is reasonably to be inferred from the tariff; and (3) the practical construction given the tariff by defendant in error at the time of the shipment and two and one-half years later when, on the occasion of the refund of the Idaho Falls-Pocatello charge, the \$116.50 rate from the point of origin to Idaho destinations was confirmed.



1. An abridgment of the tariff under discussion appears on pages 217 to 227, inclusive, of the Transcript of Record. The court will observe that after an index to points of origin (page 4 of the tariff, page 218 of the Transcript) showing Hereford is one of such points, and an index to points of destination (page 12 of the Exhibit, page 219 of the Transcript), showing Idaho Falls as one of such points (Pocatello being intermediate), there is a grouping of Texas stations (page 26 of the tariff, pages 221 and 222 of the Transcript<sup>t</sup>), and a rate basis given for each station; that is, Amarillo is taken as a base point and the other stations either take the Amarillo rate or there is a differential over or under the Amarillo rate. Hereford is listed as a station which takes the Amarillo rate without any differential; and on page 50 of the tariff (Transcript, pp. 223 and 224) the rate from Amarillo and from stations taking the Amarillo rate without a differential (in ten car lots or more) to Idaho Falls is given as \$116.50 per car.

Immediately preceding the list of stations (Tariff, p. 26; Transcript, p. 222), whose rate is thus based on the Amarillo rate, there is an explanatory note (p. 24 of the tariff, pp. 220 and 221 of the Transcript), which reads as follows:

## “Section No. 1.

“Item 200—Governing use of differentials shown in Section No. 1, pages 24-31, inclusive.

“The differentials shown in Section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates as shown in Section No. 2 hereof, pages 32 to 51, inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69.

“Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated.”

This explanatory note prescribes a limitation on the use of the Amarillo rates as base rates *in certain instances*; that is, where a station does not take the Amarillo rate, but there is a differential—an arbitrary addition to or subtraction from the Amarillo rate—the rate can thus be made up only where “application and routing is provided on pages 56 to 69” of the tariff.

On the other hand, where there is no differential, the Amarillo rate is to be applied, and there is no condition imposed that the use of the Amarillo rate is conditioned upon the existence “of application and routing” as provided elsewhere in the tariff. To illustrate: Abernathy is shown (p. 222 of the Transcript) as a station which takes the Amarillo rate, plus \$8.80. This is a differential, and the use of the Amarillo rate of \$116.50, plus

the differential of \$8.80, to make up the through rate, is permitted only where there is an application and routing provided on pages 56 to 69 of the tariff. Without such application and routing the local rate from Abernathy to Amarillo would have to be applied. Hereford, on the contrary, is shown as a station which takes the Amarillo rate without the addition of a differential, and under the explanation above quoted, there being no differential, the Amarillo rate is applicable and its application is not limited (as is true when there is a differential) to instances where application and routing is provided elsewhere in the tariff.

It is difficult to conceive of a clearer or more positive statement that stations taking the flat Amarillo rate are entitled to that rate without limitation based upon application and routing provisions provided somewhere else in the tariff. If it was intended that the use of the Amarillo rates to such stations was limited by application and routing provisions, it would indeed have been a simple matter to have so stated in the explanatory note above quoted. The inclusion of such a statement with respect to stations taking a differential over or under the Amarillo rate and its omission in the paragraph immediately following explaining the use of the Amarillo rates without differentials, indicate clearly the intention of the framers of the tariff. Indeed, but for such intention, no necessity

at all would exist for the second paragraph of the explanatory note. If, as now claimed by the carriers, Amarillo could be used as a rate basis (whether with or without differentials) only where there was the necessary routing and application shown on pages 56 to 69 of the tariff, it would have been very easy to so state. It is safe to assume that some purpose was intended to be served in making a different explanation with respect to stations taking a differential over or under the Amarillo rate than the explanation about the stations taking the flat Amarillo rate; and since in the one instance it is specifically provided that the rates can be so made only where there is the routing and application referred to, and in the other there is the clear statement authorizing the application of the Amarillo base rate without such limitation, no other conclusion is possible than that the provisions as to routing and application were to be applicable only when stations taking a differential were involved.

The routing and application referred to in the explanatory note above quoted are found on pages 56 to 69 of the tariff (Transcript, pp. 225, 227). The court will observe there is a chart of routes and a space provided for a route number between initial and delivering lines; and there is a note preceding the chart to the effect that where "route number is not shown, there are no through rates



applicable from the originating line to the destination line." In the chart (Transcript, p. 227) there is no route number shown as between Pecos and Northern Texas Railway and the Oregon Short Line Railroad, the originating and delivering lines respectively handling the shipment of plaintiff in error; and the contention of defendant in error (made for the first time almost three years after the shipment was handled) is that there being no through route shown from Pecos and Northern stations to Oregon Short Line stations, the preceding statements of the tariff prescribing the Amarillo rate for Hereford cannot be relied upon, and that the tariff states no rates whatsoever for the transportation between Hereford and Amarillo.

Notwithstanding the positive statement that the Amarillo rates are applicable from Hereford, it is urged that since no through route is shown from Pecos and Northern points (including Hereford) to Oregon Short Line points, there is no through rate, and the local rate must be used from Hereford to Amarillo, from which point the through rate of \$116.50 is conceded to be applicable.

The answer to this contention is that a positive statement in the tariff applying the base rate to a given point must control, even though the carriers involved have not agreed upon a through route or a division of the rate to be collected. If the tariff contains a positive statement, as we think it clearly



does, that Hereford should have the Amarillo rate, and there is no limitation or restriction based upon necessity for through routes or joint rates, certainly the shipper need go no further; clearly he may hold the carriers who are parties to the tariff to the positive statement which they have made. How they may adjust the matter between themselves is of no concern to him. All the carriers interested in the shipment were parties to this tariff, and if through lack of agreement for a joint rate, the carriers other than the Pecos and Northern Company were required to pay that company out of the rate collected its full local charge for the transportation from Hereford to Amarillo, that is something which is to be adjusted by the carriers themselves. It is enough for the shipper to know that the tariff to which they are all parties assures him of the right (without limitation based upon through route arrangements) of the Amarillo rate for his Hereford shipments.

The determining question is whether or not the tariff does give this positive assurance with respect to the application of the Amarillo rate to Hereford shipments. We have endeavored to point out that the language of the tariff listing the stations taking the Amarillo rate and those taking a rate slightly above or below the Amarillo rate, and explaining that as to the latter the rate construction is conditioned upon a through route arrangement

with no such limitation as to the former, indicates clearly the intention to apply the Amarillo rates to points such as Hereford regardless of the existence or non-existence of the through route arrangement between the originating and delivering lines. Had the shipment of plaintiff in error originated at a station such as Abernathy (listed as taking an \$8.80 differential over Amarillo) the provisions of the tariff authorizing the use of that differential and explaining how and when it could be used would at once advise the shipper that he could not use it, but must pay the local rate, unless there was a through route shown in the chart at page 57 of the tariff. By the specific language of the tariff and of the explanatory note which we have quoted (Tariff, p. 24; Transcript, pp. 220 and 221), this restriction applies only to such stations as Abernathy; and shipments from Hereford and like stations (taking no differentials) are entitled to the flat Amarillo rate. The shipper interested in ascertaining the rate from such stations when he reaches the point in his tariff examination where he learns that the Amarillo rate is \$116.50 and that Hereford takes the same rate, is given no reference to any other part of the tariff, or to any provision which might tell him that (as is true when a differential is prescribed) the use of the Amarillo rate *in any event* is conditioned on there being a through routing shown in the chart at the end of the tariff.

But it is urged that there is in the portion of the tariff which states the Amarillo rates an explanatory note to the effect that all of these rates, whether to be used with or without a differential, are dependent upon the "application and routing" provisions of the tariff. There appears on page 32 of the tariff (Transcript, p. 223) the following note:

"Rates from Amarillo, El Paso-Deming Groups, Item 205.

"The rates shown in Section No. 2, in columns headed 'Amarillo' and 'El Paso-Deming,' are to be applied from stations shown in Section No. 1, as taking Amarillo or El Paso-Deming rate basis or same are to be used as a basis for arriving at through rates from stations shown in Section No. 1 as taking differentials *over* or *under* Amarillo or El Paso-Deming rates, where application and routing is provided on pages 56 to 69, inclusive, from such point of origin to the destination station.

"See also item 200, page 24."

If this note be considered without the concluding direction to "see also item 200, page 24," it would clearly be contradictory of the section of the tariff applying the Amarillo rates to such points as Hereford, in view of the declaration there contained that rates made up by the use of a differential are the ones dependent on the "application and routing" provisions. However, the reference to "item 200, page 24" clears up the difficulty, for item 200

at page 24 is the note just discussed and which distinguishes between the use of the Amarillo rates with a differential and their application as flat rates where no differential is shown. No possible purpose is served by the reference to item 200 if it was not the intention to limit the broad language of this later note in the tariff by calling attention to the distinction made by item 200; so that this latter explanatory note fairly means that all Amarillo base rates are subject to the "application and routing" provisions, *except* as otherwise provided in the preceding parts of the tariff.

It is important to note, too, that the positive statement of the earlier provision of the tariff applying unequivocally the Amarillo rates to such stations as Hereford (Tariff, p. 24; Transcript, pp. 220, 221) contains no reference either to the "routing and application" section of the tariff or to the explanatory note last discussed, and which appears on page 32 of the tariff. Had these references been reversed so that the positive application of the Amarillo rates to stations taking no differential had been qualified by a direction to the later note in the tariff (Tariff, p. 32; Transcript, p. 223) explaining that *all* Amarillo base rates were subject to the provision for a through route, there might be some ground for urging that the latter note was controlling. The only reference connecting these two apparently inconsistent provisions is the one



appended to the note on page 32 of the tariff, and its direction is to "see item 200 on page 24"; and item 200 on page 24 says that where differentials are shown, they are to be used with the base rates "where application and routing is provided," and where no differentials are shown the Amarillo base rates are to be applied as indicated.

Clearly one seeking to ascertain the rate from Hereford would see no necessity for going further upon finding the unequivocal statement that the Amarillo rates were to be applied from Hereford as indicated; and if, notwithstanding the lack of any reference thereto, he came across the note on page 32 (Transcript, p. 223), providing that all Amarillo base rates were to be applied only when application and routing was provided later in the tariff, his mind would be set at ease by the reference added to this note to "see item 200 on page 24," the provision advising him definitely that the application of the Amarillo rates to stations taking no differential was not limited by any requirement for routing and application.

Giving the fullest effect to the note on page 32 of the tariff, there results an ambiguity defeating the purpose of the tariff and requiring the shipper to guess which of the two meanings would be adopted following a judicial inquiry perhaps (as here) years after his rights and obligations with respect to the property shipped had been finally and irrevocably settled.



The Interstate Commerce Act requires no such imposition upon the shipper. If, inadvertently or otherwise, there are two rates stated in the tariff or there are two constructions of the tariff possible, that which is least favorable to the carriers responsible for its publication should control. To concede an ambiguity is to admit the right in the shipper to the meaning of the tariff most favorable to him; and if the application of the Amarillo rates to Hereford is not the only possible construction of the tariff under consideration (as we contend that it is), the subsequent sections of the tariff result only in an ambiguity insufficient to deprive shippers of the advantageous rate arrangement elsewhere clearly stated in the tariff.

2. It is perhaps open to question whether expert testimony as to the interpretation properly to be given railway tariffs is admissible. *O. R. & N. Co. v. Coolidge*, 59 Ore. 5. However, such testimony was admitted and indeed invited (Transcript, p. 52) by the trial court on the assumption that it would be helpful in getting at the meaning of the tariff. We therefore direct the attention of this court to the opinions expressed by the witnesses as to the meaning of the admittedly involved and confused tariff (Transcript, p. 201).

Defendant in error offered no evidence to explain why all concerned at the time of the shipment

construed the tariff as allowing the application of the Amarillo rate of \$116.50 from Hereford; nor was there any explanation of the action of the General Freight Agent and of the Auditor of the Oregon Short Line Company (defendant in error) in refunding to plaintiff in error \$20.00 per car for the Idaho Falls-Pocatello overcharge and in confirming at that time and by that action the application of the \$116.50 rate. No traffic official or rate expert of defendant in error attended the trial, the burden of sustaining the recently discovered construction of the tariff being left to a rate clerk of the Oregon-Washington Railroad and Navigation Company (Transcript, p. 49), and a clerk in the Accounting Department of Oregon Short Line Company (Transcript, p. 152). The latter for less than a year had been in charge of the collection of undercharges for defendant in error and had previously worked in the Freight Accounting Department of the company; and his statement was that he had had 12 years' experience with "undercharges and rates and things of that kind." The testimony of this witness may be wholly disregarded because of his attempt to convince the court that the \$20.00 charge assessed for the Idaho Falls-Pocatello transportation and later refunded, was really intended to cover the Hereford-Amarillo transportation (Transcript, pp. 172, 173). The letters of the General Freight Agent and of the Auditor of the Ore-

gon Short Line Company (Transcript, pp. 117-119) show beyond question that the rate collected at the time of shipment was composed of the item of \$116.50 covering the Hereford-Idaho Falls transportation and the item of \$20.00 covering the theoretical back haul from Idaho Falls to Pocatello; and a refund of \$20.00 per car was made because Pocatello is intermediate to Idaho Falls, and there was no authority in the tariff for charging any more for Pocatello shipments than for Idaho Falls shipments. The statement was made in the letter of the Auditor (Transcript, p. 119) "that we have authority from our General Freight Agent to protect the rate of \$116.50 per car as claimed."

The rate clerk of the Oregon-Washington Company while admitting that the tariff was involved and was not clear (Transcript, p. 201), argued at length that an examination of the whole tariff indicated an intention not to permit the use of Amarillo rates, with or without a differential, unless a through routing arrangement was shown at the end of the tariff (Transcript, pp. 73-87). No satisfactory explanation appears in his testimony of the fact that the application of the Amarillo base rates to such stations as Hereford, taking no differential (Tariff, p. 24; Transcript, pp. 220-221) is unqualified, although similar application of such rates to other stations taking a differential is expressly limited by appropriate references to other parts of

the tariff; the witness concluding with the suggestion (Transcript, p. 87) "that a tariff cannot be taken on its face. It must be qualified with instructions or application."

It is enough to say of this testimony that the tariffs are designed to apprise shippers of the rates to be charged; and no construction of the tariff should be adopted which requires special qualifications in the theories and practices of rate experts.

For the plaintiff in error two men of wide experience in railroad traffic affairs and in the construction and interpretation of railway tariffs gave their opinion as to the meaning of the tariff under consideration (Transcript of Record, pp. 129, 90). One of them, J. H. Lothrop, had been for nearly thirty years in work of this kind, almost twenty-five years of which was as employe and traffic official of different railroads. For the last five and one-half years he has been secretary and manager of the Transportation Committee of the Portland Chamber of Commerce and of the Traffic and Transportation Association of the City of Portland. He has participated in many rate cases and in many discussions of rates before the Interstate Commerce Commission and elsewhere; and it is safe to say that there is no one better qualified than he to get at the fair meaning of a railway tariff. It was the opinion of the witness Lothrop that the positive application of the Amarillo rates to such stations



as Hereford, especially in view of the limitations imposed on the use of those rates to stations taking a differential, gave complete and ample authority for charging no more than the Amarillo rate of \$116.50 for shipments originating at Hereford (Transcript, pp. 137, 138) ; and the note on page 32 of the tariff (Transcript, p. 223) apparently making the application of all the Amarillo rates conditioned upon through routing provisions was insufficient, in his opinion, to alter the situation, in view of the specific reference contained in that provision directing one back to the earlier provision of the tariff making a distinction between stations taking a differential over or under Amarillo, and those which took no such differential. In answer to a question asked in cross-examination with reference to this note on page 32 of the tariff, the witness said:

“I think that the further reference under that tariff ‘see also item 200, page 24’; you are referred right to that, and it shows there absolutely plain as language can be written that where no differentials are shown, the Amarillo rate as shown in section 2 is to be applied.” (Transcript, p. 142.)

We quote further from the testimony of this witness:

“Q. Is there any reason why a shipper, or anyone else, seeking to find out what the rate from Hereford to Idaho points might be—is



there any reason, so far as you can find, why he might not rest content with what is shown in sections 1 and 2 of that tariff, without going to a section 3?

A. I see no reason why he should go to section 3 after reading that paragraph in section 1. That absolutely fixes the Amarillo rate from Hereford—the same rate from Hereford as from Amarillo. I don't know why he should go any farther. If there had been any intent on the part of the carriers to have you refer to section 3, it should have been so stated in the second paragraph, page 24, of section No. 1, exactly the same as was stated in the first paragraph.

Q. That is, in the paragraph about differentials?

A. Yes.

Q. Which governs as in case of stations like Abernathy, where there is a differential shown?

A. Yes.

Q. To stations where there are no differentials?

A. You are referred to that particular part of section 3, and if the same was intended to apply where there was no differential shown from the points of origin, why, that should also have been included in the second paragraph. The two paragraphs are absolutely separate and distinct. You cannot read a part of the first paragraph into a part of the second--into the second paragraph.

Q. Whether or not any through route was shown by any part of the tariff between Pecos & Northern Texas points and Oregon Short Line points, there was a through route from Amarillo?

A. Yes, sir.

Q. And it was entirely possible for the carriers concerned to absorb, as they call it, the local from Hereford to Amarillo and make the Amarillo rate applicable from Hereford?

A. Yes, sir."

George F. Anderson, the other witness for plaintiff in error, is traffic manager of the Union Meat Company. His experience in traffic and rate matters comprised six years' work as rate clerk for a transcontinental railway, twelve years as traffic manager for Swift and Company and eight and one-half years as traffic manager of the Union Meat Company, the latter two employments requiring of him familiarity with livestock rates and tariffs especially (Transcript, p. 94). It was Mr. Anderson's examination two years after the shipment involved of the freight bills and the allowance of the claim made by him for the \$20.00 Idaho Falls-Pocatello overcharge that probably brought up the whole question of the rates and probably resulted in the claim later advanced that a mistake had been made in applying the Amarillo rates to Hereford (Transcript, pp. 111-120).

This witness at the time of the refund of the

\$20.00 per car charge two and one-half years after the shipment made a careful examination of the tariff in question, and concluded then that the Amarillo rate of \$116.50 was clearly applicable from Hereford (Transcript, pp. 26, 97); and on that basis he obtained a refund of the additional \$20.00 per car collected for the theoretical Idaho Falls-Pocatello back haul (Transcript, p. 99). His explanation of the tariff here on the witness stand was similar to that given by the witness Lothrop; that is, it was his opinion that the positive statement of the tariff applying the Amarillo rate of \$116.50 to such stations as Hereford taking no differential being complete in itself, settled absolutely the right to that rate without regard to what might be said elsewhere in the tariff.

As previously suggested, it may be that it is the duty of the court to determine for itself as a matter of law the meaning of the railway tariff. In point of fact, many of these tariffs are intricate and involved, though perhaps not to the extent of the tariff under consideration here; and in actual practice it is probably necessary and proper to consider the opinions of men whose experience make them peculiarly qualified to interpret tariffs. The testimony which we have reviewed establishes clearly that the weight of evidence on this question of interpretation is with plaintiff in error. The witnesses for plaintiff in error were clearly better

qualified to speak on the subject of the meaning of the tariffs, and their explanations are clear and convincing. When it is remembered that the design of the tariffs is to acquaint the shipper with the rate he is to be charged, no more should be asked of him than that he adopt a construction of the tariff for which there is a reasonable basis. *Old Dominion Co. v. Penn. Rd. Co.*, 17 I. C. C. R. 309, 312. That there is such a reasonable basis for the construction of the tariff first applied and later confirmed by the carriers and now advocated by plaintiff in error, is established by the expert evidence in the case; and if it is proper to consider evidence on the subject, the position of plaintiff in error is clearly established by the testimony.

3. We cannot too strongly urge upon the court that if the meaning of this tariff is doubtful (and this is conceded, Transcript, p. 201), the practical construction given it by the carriers at the time of the shipment and by the defendant in error two and one-half years later when the Idaho overcharge was refunded is of the utmost importance. The carriers are required under the Interstate Commerce Act to collect the full amount of the charges stated by their tariffs and a mistake in the original collection or in its collection at the time of shipment does not affect the right and the duty to enforce full payment by the shipper. Where, how-

ever, the tariff is not clear, where it is susceptible of two constructions and where there is a sharp dispute between traffic and rate men as to which construction should control, the decision of the carriers made when the charges were assessed, and the confirmation of that position upon re-examination two and one-half years later, should be of the greatest assistance in determining what a shipper should reasonably be required to assume was permitted by the tariff.

As already pointed out, we are not concerned here with the task of finding out what the framer of the tariff intended. Obviously that intention was to have the tariff open to but one construction as to the rate chargeable, but if that intention was not carried out and the tariff left ambiguous, the shipper would be bound only by that construction of the tariff for which there was a reasonable basis; and what the parties have actually done with respect to the interpretation of the tariff goes a long way toward determining the presence or absence of that reasonable basis.

As already explained, the carriers involved in this transportation collected and divided among themselves charges based upon the application of the Amarillo rate of \$116.50 to Hereford. No rate-revising clerk, traffic or accounting official of any of the carriers involved suggested for more than two and one-half years that any other construction



of their tariff than the one applied at the time of the shipments was possible; and it is perhaps safe to assume that if plaintiff in error had not demanded and collected the overcharge resulting in the \$20.00 per car collection for the Idaho Falls-Pocatello theoretical back haul, the claim now made by defendant in error for the local charge of \$26.40 per car for the Hereford-Amarillo transportation would never have been heard of.

We may infer that the requirements of the Interstate Commerce Act compel a careful examination of the tariffs by the carriers, not only when rates are quoted and later when charges are collected, but also when the freight bills and the remittances reach the accounting staffs of the carriers. Each carrier has its rate revision bureau and the quotation and collection of rates are no doubt most carefully scrutinized so that instances of under collections may be found and the mandate of the law observed by a subsequent collection. In the absence of testimony to the contrary, it is fair to assume that all of this was done with respect to plaintiff's shipment; and certainly two and one-half years ought to be ample time for the ascertainment of error in the collection of freight charges.

The claim now made that there was an error in applying the Amarillo rate to Hereford, supported by an argument of an accounting department clerk

and of a rate clerk of another carrier, disregards the conclusion which must have been reached by all concerned at the time of the shipment. It is to be borne in mind, too, that this shipment was not one of minor importance. It consisted of 43 cars, and the total charges paid amounted to over \$6,000.00. Surely the question of the rate applicable must have received careful consideration, both on the part of the traffic officers soliciting and securing the shipment and on the part of officials charged with the duty of collecting and distributing the transportation charges.

If, as is virtually conceded, opinions may well vary as to what the tariff does mean, it is difficult to say why defendant in error is entitled to urge its present construction of the tariff, poorly supported in the record as it is, as opposed to the construction given the tariff by its representative and by representatives of connecting carriers who had the responsibility of quoting the rate and of collecting the charges at the time of the shipment.

Of great importance, also, is the confirmation of the \$116.50 rate at the time of the refund made to plaintiff in error two and one-half years after the shipment. It is true that the question now before the court, that is, the propriety of applying the Amarillo rate from Hereford, was not specifically discussed in the correspondence between the parties on the subject of this refund. The court will

note, however, that in the letter addressed to the General Freight Agent of defendant in error (marked for his personal attention), there was a specific reference to the rate of \$116.50 and its application from Hereford. This letter said (Transcript, p. 118) :

“It seems as though this rate was based on a through rate of \$116.50 for 36-foot 6-inch car from Hereford to Idaho Falls, plus \$20.00 Idaho Falls to Pocatello, based upon the application of item 5 of tariff 2271-B, I. C. C. 265.”

This letter was answered by the Auditor of defendant in error under date of January 16, 1915. The answer, after a reference to the personal letter to the General Freight Agent, said that “we have authority from our General Freight Agent to protect the rate of \$116.50 per car as claimed.”

Here again we may assume, in view of the mandate of the Interstate Commerce Act, that a most careful check of the applicable tariffs was made. Certainly no carrier in these days of strict adherence to published tariffs would be willing to turn back to a shipper over \$600.00 of the freight charges paid by him without the most careful examination of the tariffs, and without the conclusion that those tariffs justified and required the remission. While the subject of the Hereford-Amarillo charge was not specifically referred to in the correspondence about the overcharge, of necessity it

must have been considered by the carriers before the refund was made. The propriety of the total charge of \$136.50 was questioned by plaintiff in error, and defendant in error after due consideration came to the conclusion that no more than \$116.50 per car was properly collectible.

We repeat again that if there is doubt as to the meaning of the tariff under consideration, no reason exists for accepting the construction now advocated by defendant in error instead of that necessarily adopted upon a review of the subject at the time of the refund two and one-half years after the shipment. In any transaction not affected by the requirements of the Interstate Commerce Law, such a practical construction by the parties involved would be an absolute bar to the assertion of a claim like that now made by defendant in error. We assert that there is nothing in the Interstate Commerce Law or in its mandate requiring the full collection of all tariff charges which prevents the acceptance of the construction given to this tariff by the carriers at the time of the shipment and at the time of the refund. Concededly, the tariff was open to two different constructions, and the shipper was fairly entitled to adopt that construction first applied so long as there was a reasonable basis for it. Unquestionably there was a reasonable basis for the construction of the tariff under which the Amarillo rate was applied to Here-



ford, since all concerned so interpreted the tariff until almost three years after the shipment; and we assert that this construction should now be binding upon defendant in error.

The injustice to a shipper of enforcing collection of an undercharge account years after the shipment moved is apparent. In most instances the property shipped is the subject of sale at the time of or not long after the transportation, and the price received is usually influenced by the freight charges paid. When additional freight charges are demanded years after the shipment, the shipper has no recourse upon his purchaser, and the collection from him turns his transaction from a profit to a loss. One of the objects of the publication of tariffs is to inform the public of the charges collectible so that in business transactions including transportation of property the shipper may know the expense to be incurred and make his bargain accordingly.

The hardship to the individual shipper resulting from the enforced collection of undercharges long after the transaction has been closed has frequently been the subject of consideration by Congress; and thus far no way has been found to relieve from that hardship without impairing the effectiveness of the provisions of the Act forbidding preferences. We understand there is before the present Congress a bill designed to limit to two



years the time within which the carriers may enforce undercharge claims. While the six-year period usually allowed by state statutes is the only time limit imposed restricting the collection of undercharges, the Interstate Commerce Act, as construed by the Commission and the Commerce Court, limits the time for recovering from the carriers unreasonable exactions of freight charges to two years *from the time the shipment moved*. *Blinn Lumber Company v. Southern Pacific*, 18 I. C. C. R. 432; *Arkansas Fertilizer Co. v. U. S.*, 193 Fed. 667. The result of this anomalous situation is that the carrier may delay (as did defendant in error here) the prosecution of its alleged claim for undercharge until more than two years after the time of shipment; and then if recovery is allowed, the shipper has no recourse whatsoever, even though the tariff under which the undercharge was collected was wholly unreasonable and would be so determined by the Commission and the courts. It is safe to say that the Commission would readily condemn the tariff under consideration here as unreasonable if it is properly interpreted as requiring the additional collection of the \$26.40 local rate for the transportation from Hereford to Amarillo, but the lapse of time before prosecution of the undercharge claim is such that the plaintiff in error would be entirely without remedy.

The effort to enforce collection of the undercharge claim in this case results, we assume, from

the notion that the Interstate Commerce Act requires such action; that, regardless of the hardship to plaintiff in error, the necessity for equal treatment to all requires enforcement of the published tariffs. Because of the evident injustice to the individual shipper, however, the added burden should not be imposed unless there is the clearest necessity for so doing. Only when the published tariff clearly and unmistakably requires it should the shipper be assessed an additional charge long after the burden of this charge can be distributed or placed where it properly belongs.

It is not enough that a careful analysis of the tariff may lead to the conclusion that its framers intended not to construe the tariff as did the carriers at the time of the shipment and at the time of the refund. The intention of the framers of the tariff, particularly under such circumstances as exist here, should give way to that which might reasonably be inferred from the language of the tariff. In other words, if there is any reasonable basis for the construction of the tariff permitting the application of the Amarillo rate of \$116.50 to Hereford shipments, no other construction should now be adopted.

The opinion of the trial court (Transcript, pp. 15-20) makes this point clear. Referring to the portion of the tariff which applies without restric-

tion the Amarillo rates to such stations as Hereford, the court said:

“Reading the explanatory note to section 1 by itself and without reference to the succeeding notes, its meaning would appear to be plain that where there were differentials the rates shown in section 2 would not apply unless the routing was provided on pages 56 to 69; but that where there were no differentials shown, the shipment would take the section 2 rates without regard to whether the application and routing were provided on pages 56 to 69 or not.”

The court then goes on to consider all of the other provisions of the tariff and, taking the entire 70-page document as a whole, concludes that the intention of its framers was to permit the application of the Amarillo base rates, whether with or without differentials, only where through routes were shown. The opinion demonstrates, however, that (1) a shipper examining the tariff to ascertain the Hereford rate would be led to page 24, where he would be informed without qualification that the Amarillo rates were to be applied; and (2) to be advised that the contrary was true, it would be necessary for him to read the entire tariff, study its plan of construction, and put himself practically in the position, not of one seeking information as to a particular rate, but rather of one aiming to learn the theory upon which the entire structure of rates stated in the tariff was based.

We believe that the Interstate Commerce Act places no such burden upon the shipper. The tariffs are the announcement to the public of the rates to be charged, and the public is entitled to rely upon that construction which is reasonably to be drawn from what is said in the tariffs. As suggested by the Interstate Commerce Commission in the case cited *supra*, if there is any reasonable basis for the construction upon which the shipper has relied, that construction should govern; and it should make no difference that a careful, judicial analysis of the entire tariff leads to a conclusion that the framers of the tariff intended that it should have a different meaning. The shipper when he contracts for the transportation and contracts to sell his product, basing his price in part on the transportation cost, cannot have the benefit of a careful, judicial inquiry into the intention of the framer of the tariff. He must rely upon what the tariff apparently says with reference to the particular rate he is interested in; and if there is any reasonable basis for the conclusion which he reaches with reference to the rate applicable to his shipment, he should be protected in relying upon that conclusion.

We assert that the record here abundantly supports the conclusion that this tariff should be construed as the carriers construed it at the time of the shipments, and at the time of the refund two

and one-half years later. But if we are wrong in this, certainly there can be no doubt of the ambiguity of the tariff. The practical construction of the tariff by the carriers, the opinion of the experienced witnesses as to its meaning, and the opinion of the trial court indicating how the new construction of the tariff is arrived at, demonstrate that whatever conclusion one may reach independently as to the intention of the framers of the tariff, the question of its meaning is an open one, and the shippers and the public may well rely upon either construction. In this situation there is a reasonable basis for the construction of the tariff first adopted and later confirmed by the carriers; and this is enough to deny to the carriers the right to change to the construction of the tariff now claimed.

Respectfully submitted,

CAREY AND KERR,

CHARLES A. HART,

Attorneys for Plaintiff in Error.



In the  
**United States Circuit Court  
of Appeals**

**For the Ninth Circuit**

---

**PORTLAND CATTLE LOAN COMPANY, a corporation,**

**Plaintiff in Error.**

**vs.**

**OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,**

**Defendant in Error.**

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**Brief for Defendant in Error**

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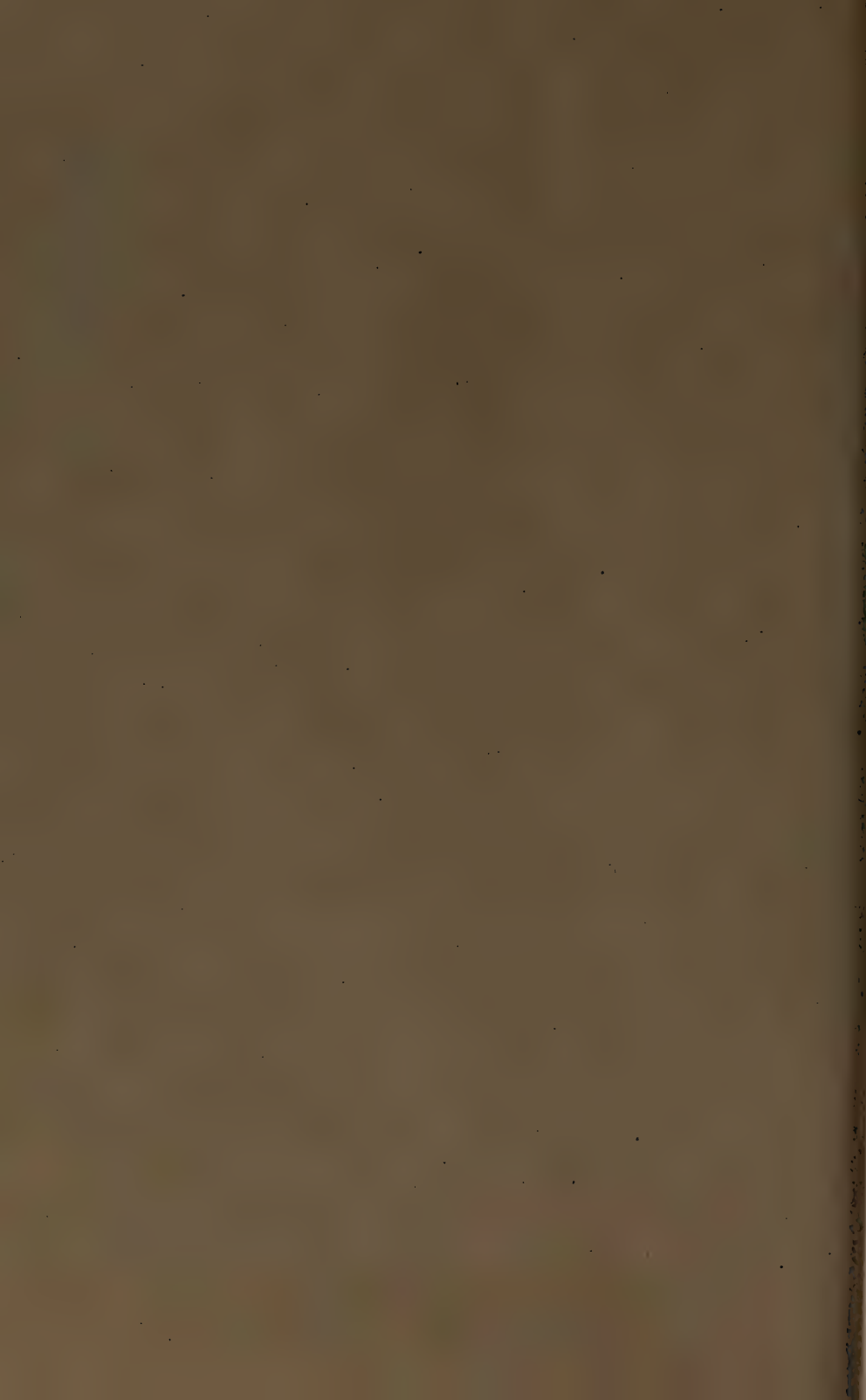
**On Writ of Error to the District Court of the  
United States for the District of Oregon**

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**CAREY and KERR and CHARLES A. HART,  
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Plaintiff in Error.**

**GEO. H. SMITH, A. C. SPENCER and W. A.  
ROBBINS, Wells Fargo Building, Portland,  
Oregon, Attorneys for Defendant in Error.**

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No. 3103

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In the  
**United States Circuit Court  
of Appeals**

**For the Ninth Circuit**

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PORTLAND CATTLE LOAN COMPANY, a corporation,

Plaintiff in Error.

vs.

OREGON SHORT LINE RAILROAD COMPANY,  
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Defendant in Error.

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**Brief for Defendant in Error**

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**On Writ of Error to the District Court of the  
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*United States Circuit Court of Appeals for the  
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PORTLAND CATTLE LOAN COMPANY, a corporation,

Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,

Defendant in Error.

---

CAREY and KERR and CHARLES A. HART,  
Yeon Building, Portland, Oregon, Attorneys for  
Plaintiff in Error.

GEO. H. SMITH, A. C. SPENCER and W. A.  
ROBBINS, Wells Fargo Building, Portland,  
Oregon, Attorneys for Defendant in Error.



## STATEMENT OF THE CASE.

On September 28, 1912, the Portland Cattle Loan Co., caused A. G. Greenmeyer to deliver to the Pecos & Northern Railway Company, at Hereford, Texas, 44 carloads of cattle for transportation from that point to the Portland Cattle Loan Company, at Napa, Idaho. The defendant in error and its connecting carriers transported said 44 carloads of cattle from Hereford, Texas, to Amarillo, Texas, where the said 44 carloads were combined into 43 carloads and were thereupon transported over the connecting lines of railroad to Pocatello, Idaho, at which place 27 of said 43 carloads of cattle, upon the order of the Portland Cattle Loan Company, were delivered to them by the Oregon Short Line Railroad Company.

The Portland Cattle Loan Company thereupon ordered the Oregon Short Line Railroad Company to divert and transport 16 of said 43 carloads of cattle to Butte, Montana, at which point said 16 cars were afterwards delivered to the Portland Cattle Loan Company.

Upon arrival of the 27 carloads of cattle at Pocatello a rate of \$136.50 per car was erroneously assessed and collected by the Oregon Short Line Railroad Company and thereafter, upon the earnest solicitation of the Portland Cattle Loan Company, the Oregon Short Line Railroad Company erroneously refunded to them the sum of \$20.00 per car, leaving a net collection on the 27 cars moving to Pocatello, Idaho, of \$116.50.

Thereafter the auditor of the Oregon Short Line Railroad Company, in checking up said payments,

discovered that the lawful, published and filed tariff applicable to said movement provided a charge of \$142.90 per car, making a total undercharge on each of said cars of \$26.40.

On the 16 cars moving from Hereford, Texas, to Butte, Montana, the Oregon Short Line Railroad Company originally assessed and collected the sum of \$164.80 per car. The auditor, in re-checking these collections discovered that the lawful, published and filed tariff rate applicable to said movement was \$171.20 per car, leaving an undercharge of \$6.40 per car on each of the 16 cars moving from Hereford, Texas, to Butte, Montana.

In making the refunds in question the Oregon Short Line Railroad Company also paid to the Portland Cattle Loan Company the sum of \$75.70 interest. In other words, the account foots up as follows (not counting interest):

1 car cattle, Hereford to Amarillo, at \$26.40 per car .....	\$ 26.40
27 cars cattle, Hereford to Pocatello, at \$142.90 per car .....	3,858.30
16 cars cattle, Hereford to Butte, at \$171.20 per car .....	2,739.20
	<hr/>
	\$6,623.90
Paid on account .....	\$6,342.30
Refund in error Jan. 20, 1915....	\$387.70
Refund in error Sept. 17, 1915....	228.00
	<hr/>
Total Refund in error.....	\$615.70 \$ 615.70
Amount paid on account after deducting re- funds .....	5,726.60
	<hr/>
Balance due .....	\$ 897.30

This case was tried at Portland, Oregon, before Mr. Judge Wolverton, April 16, 1917, and thereafter judgment was rendered in favor of defendants in error. Said decision is reported in 245 Fed. at page 214.

## POINTS AND AUTHORITIES.

### I.

It is conceded that the shipper is bound to pay, and the carrier is obliged to collect the lawful, published and filed tariff rate, regardless of any mistakes of the shipper or the carrier in applying the proper rate.

*L. & N. Ry. Co. v. Maxwell*, 237 U. S. 94-97  
(citing a number of U. S. cases).

### II.

Where there are no applicable joint through rates established, shipments even if moving on through bills of lading must take the combination of local rates.

*Kas. City So. Ry. v. Albers Comm. Co.*, 223 U. S. 573-596.

## ARGUMENT.

Judge Wolverton in 245 Fed., page 214, has summed up the issue in this case very concisely, as follows:

"The plaintiff claims that under joint live stock tariff 100-A, then in force, the proper charges on these shipments are made up as follows: local from Hereford to Amarillo \$26.40 per car, and from Amarillo to Pocatello \$116.50 per car, making a total of \$142.90 per car for the shipment of 27 cars. To Butte, the same

local from Hereford to Amarillo, to which is added \$125.00 to Dillon, Montana, and the local from Dillon to Butte—\$19.80, making a total of \$171.20. The entire controversy centers about the local charge of \$26.40 from Hereford to Amarillo, the defendant insisting that Hereford is a common point with Amarillo and that the rate designated under Sec. 2 of the tariff constitutes the entire rate from Hereford to Pocatello.”

It is therefore necessary to analyze the tariffs in question to determine the legal applicable rate applying on these shipments.

The court will observe, by referring to page 24 of Plaintiff's Exhibit 1, the following:

“Item 200—covering use of differentials shown in Sec. 1, pages 24 to 31 inc. The differentials shown in Sec. 1 are to be added to, or deducted from, the Amarillo or El Paso-Deming rates as shown in Sec. 2 hereof, pp. 32, 51, inc., to arrive at the through rate, *where application and routing is provided, on pages 56 to 69.*”

Referring to pages 56 to 69 of Plaintiff's Exhibit 1, it will be observed, on p. 56, under “Application of rates” appears the following note:

“Rates provided herein from points of origin shown in Sec. 1, to points of destination shown in Sec. 2, will apply only via the route indicated in chart on p. 57, except as provided in item 350 (item 350 is not material in this discussion).

“Note 1. *Where route number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in Sec. 3.*” (Sec. 3 has no bearing on the controversy.)



It is therefore necessary to refer to the route and application chart shown on p. 57 of Plaintiff's Exhibit 1, to determine whether or not there are any applicable through rates from Pecos and Northern Texas Railway points to Oregon Short Line points.

By referring to p. 57 of Plaintiff's Exhibit 1, it will be observed that the Pecos and Northern Texas Railway Company is mentioned in the chart on the twelfth line from the top of the page, and the Oregon Short Line Railroad Company is mentioned at the top of the page in line 15, counting from the left hand side of the page. It will also be observed where these two lines meet, no route number is inserted, which means, as is stated in item 360, in note 1, p. 56 of Plaintiff's Exhibit 1—"Where route number is not shown, there are no through rates applicable from the originating line (Pecos and Northern Texas Railway) to the destination line (Oregon Short Line Railroad points)." No through rates or through route being authorized by the tariff it follows that the rate applicable must of necessity be made by a combination of the published rates.

Referring to Plaintiff's Exhibit 2 it will be observed that it is 47 miles from Hereford, Texas, to Amarillo, Texas, and on (pencil) page 7, the tariff provides "When exact distance is not shown, use next greater distance." It will be observed that the next greater distance mentioned in the tariff, than 47 miles, is 50 miles. Referring to A. T. & S. F. Tariff No. 6016-E—I. C. C. 5280, it will be observed, for a distance of 50 miles, on cattle in carload lots, a rate of 12c per cwt. is provided for a 36-ft. 6-in. car, with minimum of 22,000 lbs. which makes the local rate of \$26.40 from Hereford to Amarillo.

On the 27 cars of cattle moving from Hereford



to Pocatello the rate of \$142.90 per car is constructed by a combination of the local rate of \$26.40 applicable from Hereford to Amarillo, plus the Pocatello rate (Idaho Falls rate) of \$116.50, making a total charge of \$142.90 per car from Hereford to Pocatello.

Referring to the index of points of destination shown on p. 9, *et seq.*, of Plaintiff's Exhibit 1, it will be noted that Pocatello is not named as a point of destination, thereby making it necessary to make an intermediate application of the Idaho Falls rate under item No. 5, on p. 18 of Plaintiff's Exhibit 1, which reads as follows:

"To a point of destination not named in Sec. 2 of this tariff, but which is directly between two points to which specific rates are named, in such section, the rate to apply will be the rate to the more distant of the two points between which the intermediate point is located; routing to be the same as applies to the more distant point."

Referring to Sec. 2, on p. 50 of Plaintiff's Exhibit 1, it will be noted that no specific rate is named to Pocatello, but specific rates are named to Idaho Falls, Idaho, and Cheyenne, Wyoming, and an examination of the map in evidence in this case will show that Pocatello, Idaho, is intermediate to these points, and is the more distant of said points, therefore under the intermediate application above referred to, the specific rate of \$116.50, shown on p. 50 of Exhibit 1, as applying from Amarillo group to Idaho Falls, on carload lots of 10 cars or more, is the proper rate to apply. The rate therefore, from Hereford, Texas, to Pocatello, Idaho, would be a combination of the local rate from Hereford to Amarillo, of \$26.40, plus the rate from Amarillo to

Pocatello (Idaho Falls rate) of \$116.50 or a total rate of \$142.90.

In regard to the 16 cars moving from Hereford to Butte the rate is constructed by a combination of the local rate of \$26.40 applying from Hereford to Amarillo, plus the rate of \$125.00 applying to Dillon, Montana, plus the rate from Dillon, Montana, to Butte, Montana, of \$19.80, making a total of \$171.20 per car.

The court will observe by referring to p. 50, Plaintiff's Exhibit 1, under index 2060, a specific rate of \$125.00 per car in lots of 10 cars or more is provided on shipments of livestock moving from the Amarillo group to Dillon, Montana. Referring to the map in evidence, it will be noted that Butte is located north of Dillon, and that no specific through rate from Amarillo to Butte is named on p. 50 of Plaintiff's Exhibit 1. It therefore becomes necessary to assess the local rate of \$26.40 from Hereford to Amarillo and the rate from the Amarillo group to Dillon of \$125.00 per car and then assess the local rate applying from Dillon to Butte. This last rate is shown under index 15, p. 9, O. S. L. Local and Joint Tariff 3281, I. C. C. 14069, which provides a rate of \$18.00 for 30-ft. cars from Dillon to Butte, and supplement 14, under same tariff, provides 110 per cent of this rate for cars 33 ft. 9 in. to and including 36 ft. 7 in. inside measurements which makes the total rate from Dillon to Butte, Montana, \$19.80 for 36 ft. 7 in. cars. The combination of these rates makes a total charge of \$171.20 per car applying on the 16 cars moving from Hereford, Texas, to Butte, Montana.

As we stated in the beginning, the real controversy in this case centers about the charge of \$26.40

from Hereford to Amarillo, the other rates are practically conceded by the defendant to be correctly applied, and as stated by Judge Wolverton, in 245 Fed. 215: "When we turn to the note on p. 56 (Plaintiff's Exhibit 1) respecting the application of rates we will find that the rates from points of origin shown in Sec. 1 (Plaintiff's Exhibit 1) to points of destination shown in Sec. 2, will apply only via the routes indicated on p. 57. This is a specific declaration, general in scope, without reference to differentials, that the rate so provided will apply only via the routes designated on p. 57. The note thereto is but a reinforcement of the idea . . . but whatever may be the true rendering of the notes to Sections 1 and 2 the notes on p. 56 explaining the 'application of the rates' are directly applicable to the present controversy, as no Oregon Short Line routing is shown on shipments coming from and over the Pecos and Northern Texas Railway on p. 57 and, as we have seen, the regulation is general, and specifically limits the application of rates to points in Sec. 1, to points of destination in Sec. 2, to the routes indicated in the chart on p. 57." Mr. Judge Wolverton's language very tersely and ably sums up our views of this entire situation.

Counsel states, in his brief, on p. 23, that witnesses, S. J. French and R. A. Rankin, called on behalf of defendant in error, were not as well qualified to interpret the tariffs in question, as Mr. Geo. Anderson and J. H. Lothrop, witnesses called on behalf of plaintiff in error. In this connection counsel neglected to point out to the court, as is shown on p. 90 of Transcript, that Mr. Anderson was the traffic manager for the Portland Cattle Loan Company, and is the man who secured the



erroneous refunds in question and, as a matter of fact, is more interested in the outcome of this case than any of the witnesses on behalf of defendant in error, and he is naturally anxious to have this court adopt his interpretation of the tariff. Furthermore Mr. Lothrop, as shown on p. 129 of Transcript, is traffic manager of the Portland Traffic & Transportation Association, in charge of rate and traffic matters for that association, and it is part of his business to assist jobbers and shippers in securing refunds from the railroad companies, in all cases where it is at all possible.

Mr. French, as is shown by his testimony (Trans. p. 49, *et seq.*), has been continually engaged in the interpretation of tariffs for the period of fourteen years, and Mr. Rankin (Trans. p. 152) has had entire charge of the facts and circumstances involved in this case for something over one year, and both witnesses were eminently qualified to testify in this case.

In conclusion, therefore, we submit that the judgment of the lower court should be affirmed for the reason that the tariffs in question plainly show there are no through rates, or through routes, from points on the Pecos and Northern Texas Railway to Oregon Short Line points, for the following reasons:

1. The application of rates is defined on p. 56, Plaintiff's Exhibit 1, and points out specifically that rates will apply only via the routes indicated in the chart on p. 57.

2. The chart on p. 57 shows that no through route is shown from Pecos and Northern Texas Railway points to Oregon Short Line points.

3. The basis of rates from points on the Pecos

and Northern Texas Railway are shown in Sec. 1, p. 26 of Plaintiff's Exhibit 1, and the rates to points on the Oregon Short Line Railroad are provided in Sec. 2, p. 50.

4. Item 360, p. 56, Plaintiff's Exhibit 1, states that rates provided in tariff from points of origin shown in Sec. 1, to points of destination shown in Sec. 2, *will apply only via routes indicated in the chart on p. 57, and note 1 of same item states that "where no route is shown there are no through rates applicable from originating line to destination line."*

5. The last paragraph of item 200, Sec. 1, p. 24, Plaintiff's Exhibit 1, states, where no differentials are shown the Amarillo or El Paso-Deming rates, as shown in Sec. 2, are to be applied *as indicated*. Sec. 2 *indicates* that Amarillo or El Paso-Deming rates *apply where application and routing is provided on pp. 56 to 69 inc.* An examination of the route chart on p. 57 shows that no application of routing is provided, it follows, therefore, that there can be no through rate or through route from Hereford, or any other points on the Pecos and Northern Texas Railway to points on the Oregon Short Line Railroad, regardless of whether there is provided a differential over or under the Amarillo rate.

7. No through rates and no through routes are described or mentioned in the tariffs in question, from any points on the Pecos and Northern Texas Railway to any point on the Oregon Short Line Railroad.

Respectfully submitted.

GEO. H. SMITH

A. C. SPENCER,

W. A. ROBBINS,

Attorneys for Defendant in Error.





No. 3104

4

**United States Circuit Court  
of Appeals**

**For the Ninth Circuit**

PORTLAND FEEDER COMPANY, a corporation,

*Plaintiff in Error,*

*vs.*

OREGON SHORT LINE RAILROAD COMPANY,

a corporation,

*Defendant in Error.*

**TRANSCRIPT OF RECORD**

On Writ of Error to the District Court of the  
United States for the District of Oregon.

FILED

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F. D. SHERMAN,

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**United States Circuit Court  
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PORTLAND FEEDER COMPANY, a corporation,  
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**TRANSCRIPT OF RECORD**

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*United States Circuit Court of Appeals for the  
Ninth Circuit.*

PORTLAND FEEDER COMPANY, a corporation,  
*Plaintiff in Error,*

*vs.*

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,  
*Defendant in Error.*

Names and addresses of Attorneys of Record:

CAREY AND KERR and

CHARLES A. HART,

Yeon Building,

Portland, Oregon,

Attorneys for Plaintiff in Error.

A. C. SPENCER and

W. A. ROBBINS,

Wells Fargo Building,

Portland, Oregon,

Attorneys for Defendant in Error.

*In the District Court of the United States for the  
District of Oregon.*

PORTLAND FEEDER COMPANY, a corporation,  
*Plaintiff in Error,*

*vs.*

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,  
*Defendant in Error.*

CITATION ON WRIT OF ERROR.

United States of America, District of Oregon, ss.

To Oregon Short Line Railroad Company, a corporation,  
ation,

Greeting:

Whereas, Portland Feeder Company has petitioned for, and an order has been made allowing a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in the District Court of the United States for the District of Oregon in your favor, and has given the security required by law;

You are therefore hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof to show cause, if any there be, why the errors complained of in said judgment should not be corrected and speedy justice should not be done to the parties in that behalf.



Given under my hand at Portland in said district this 9th day of November in the year nineteen hundred seventeen.

Chas. E. Wolverton,  
Judge.

Service accepted this 9th day of November, 1917.

W. A. Robbins,  
Of Attorneys for Plaintiff Oregon Short Line Railroad Company.

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In the United States Circuit Court of Appeals for  
the Ninth Circuit.

Portland Feeder Company, a corporation,  
Plaintiff in Error,  
vs.

Oregon Short Line Railroad Company, a corporation,  
Defendant in Error.

### WRIT OF ERROR.

The United States of America, ss.

The President of the United States of America.  
To the Judge of the District Court of the United  
States for the District of Oregon,  
Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between Oregon Short Line Railroad Company, a corporation, plaintiff

and defendant in error, and Portland Feeder Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White,

Chief Justice of the Supreme Court of the United States this 9th day of November, 1917.

G. H. Marsh,

Clerk of the District Court of the United States for the District of Oregon.

(Seal.)

By F. L. Buck,  
Deputy.

Endorsed: No. 7232.

In the U. S. Circuit Court of Appeals for the Ninth Circuit. Portland Feeder Company, a corporation, Plaintiff in Error, vs. Oregon Short Line Railroad Company, a corporation, Defendant in Error. *Writ of Error*. Filed November 9, 1917. G. H. Marsh, Clerk United States District Court, District of Oregon. By F. L. Buck, Deputy Clerk.

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In the District Court of the United States for the District of Oregon.

November Term, 1916.

Be it remembered that on the 2d day of November, 1916, there was duly filed in the District Court of the United States for the District of Oregon, an amended complaint in words and figures as follows, to-wit:

### COMPLAINT.

In the District Court of the United States in and for the District of Oregon,

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

Oregon Short Line Railroad Company, a corporation organized and existing under and by vir-

tue of the laws of the State of Utah, brings this, its complaint, against Portland Feeder Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, on a cause of action arising under the laws regulating commerce, and, thereupon, complains and says:

### I.

That the plaintiff, Oregon Short Line Railroad Company, now is, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Utah, doing business as a common carrier in the states of Utah, Wyoming, Idaho and Montana, and at and through Red Rock and at and through Monida, in the State of Montana; and was at all of said times engaged in the transportation of freight for hire as a common carrier, both individually and in connection with other common carriers, from points in the State of Texas and elsewhere to points in the State of Idaho and to points in the State of Montana.

### II.

That the defendant, Portland Feeder Company, now is, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Oregon.

### III.

That on or about the 14th day of September, 1912, A. G. Greenameyer delivered to the Panhan-

dle & Santa Fe Railway Company, at Hereford, in the State of Texas, thirty-six (36) carloads of cattle for transportation by freight from Hereford, Texas, to Red Rock, Montana, over the line of said Panhandle & Santa Fe Railway Company to Amarillo, Texas, and thence over the lines of connecting carriers to the line of the Oregon Short Line Railroad Company, plaintiff herein, there to be delivered at Red Rock, Montana, to Portland Feeder Company, defendant herein; and the said railroads as connecting carriers thereupon transported the said thirty-six (36) carloads of cattle from Hereford, Texas, to Amarillo, Texas, and thence to Monida, in the State of Montana, in accordance with diversion instructions issued by defendant to this plaintiff, at which last-mentioned place the said thirty-six (36) carloads of cattle, upon the order of defendant, were delivered to the defendant by this plaintiff.

#### IV.

That more than thirty days prior to the delivery of said freight to the carriers aforesaid, said carriers had duly filed with the Interstate Commerce Commission of the United States at Washington, D. C., and posted and published, pursuant to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, commonly known as the Interstate Commerce Act, tariffs



showing and establishing the lawful charges to be made to all persons, as in said act provided, for the transportation of cattle in carload lots by freight between said stations of Hereford, Texas, and Monida, Montana; that the lawful charges established by said tariffs on said carloads of cattle between Hereford, Texas, and Monida, Montana, as aforesaid, amounted to the sum of one hundred forty-four and 90/100 dollars (\$144.90) per car, making in the aggregate due for the transportation of said thirty-six (36) cars the sum of five thousand two hundred sixteen and 40/100 dollars (\$5,216.40); that no part thereof, except the sum of four thousand nine hundred eighty-six dollars (\$4,986.00) has been paid, although payment thereof has been duly demanded of and refused by defendant herein; and that there is now due and owing from defendant to plaintiff the sum of two hundred thirty and 40/100 dollars (\$230.40), with lawful interest thereon from September 9, 1912.

## SECOND CAUSE OF ACTION.

For a second cause of action against the defendant, this plaintiff complains and says:

### I.

That the plaintiff, Oregon Short Line Railroad Company, now is, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Utah, doing business as a common carrier in the

states of Utah, Wyoming, Idaho and Montana, and at and through Red Rock and at and through Monida, in the State of Montana; and was at all of said times engaged in the transportation of freight for hire as a common carrier, both individually and in connection with other common carriers, from points in the State of Texas and elsewhere to points in the State of Idaho and to points in the State of Montana.

## II.

That the defendant, Portland Feeder Company, now is, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Oregon.

## III.

That on or about the 29th day of August, 1912, A. G. Greenameyer delivered to the Panhandle & Santa Fe Railway Company, at Abernathy, in the State of Texas, thirty-two (32) carloads of cattle for transportation by freight from Abernathy, Texas, to Pocatello, Idaho, over the line of the said Panhandle & Santa Fe Railway Company to Amarillo, Texas, and thence over the lines of connecting carriers to the line of the Oregon Short Line Railroad Company, plaintiff herein, there to be delivered at Pocatello, Idaho, to Portland Feeder Company, defendant herein; and the said railroads, as connecting carriers, thereupon transported said thirty-two (32) carloads of cattle from Abernathy,

Texas, to Amarillo, Texas, and thence to Pocatello, Idaho, at which last-mentioned place twenty-one (21) of said thirty-two (32) carloads of cattle, upon the order of defendant, were delivered to the defendant by this plaintiff, and thereupon defendant ordered this plaintiff to divert and transport eleven (11) carloads of said thirty-two (32) carloads of cattle to American Falls, Idaho, and plaintiff thereupon transported the said eleven (11) carloads of cattle to American Falls, Idaho, at which place the said eleven (11) carloads of cattle were delivered to the defendant by this plaintiff.

#### IV.

That more than thirty days prior to the delivery of said freight to the carriers aforesaid, said carriers had duly filed with the Interstate Commerce Commission of the United States at Washington, D. C., and posted and published pursuant to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, commonly known as the Interstate Commerce Act, tariffs showing and establishing the lawful charges to be made to all persons, as in said act provided, for the transportation of cattle in carload lots, by freight, between said stations of Abernathy, Texas, and Pocatello, Idaho, and between said stations of Abernathy, Texas, and American Falls, Idaho; that the lawful charges established by said tariffs on

said carloads of cattle between Abernathy, Texas, and Pocatello, Idaho, as aforesaid, amounted to the sum of one hundred fifty-six and 10/100 dollars (\$156.10) per car, making a total sum for the said twenty-one (21) cars of three thousand two hundred seventy-eight and 10/100 dollars (\$3,278.10); that the lawful charges established by said tariffs on said carloads of cattle between Abernathy, Texas, and American Falls, Idaho, amounted to the sum of one hundred seventy and 10/100 dollars (\$170.10) per car, making a total sum for the said eleven (11) cars of one thousand eight hundred seventy-one and 10/100 dollars (\$1,871.10); and that the entire amount of the lawful charges due from the said defendant to the plaintiff, as aforesaid, was five thousand four hundred nine and 20/100 dollars (\$5,409.20); that no part thereof, except the sum of four thousand five hundred twenty-two dollars (\$4,522.00), has been paid, although payment thereof has been duly demanded of and refused by defendant herein; and that there is now due and owing from defendant to plaintiff the sum of six hundred twenty-seven and 20/100 dollars (\$627.20), with lawful interest thereon from August 29, 1912.

Wherefore, plaintiff prays judgment against the defendant on the first cause of action in the sum of two hundred thirty and 40/100, with lawful interest thereon from the 14th day of September, 1912.



and on the second cause of action in the sum of six hundred twenty-seven and 20/100 dollars (\$627.20), with lawful interest thereon from the 29th day of August, 1912, together with its costs herein expended.

Geo. H. Smith,  
A. C. Spencer, and  
W. A. Robbins,  
Attorneys for Plaintiff.

Portland, Oregon.

State of Utah, County of Salt Lake, ss:

G. L. Hickey, being duly sworn, on oath deposes and says: That he is an officer of the above-mentioned plaintiff corporation, to-wit, its assistant general manager, and makes this verification for and on behalf of said plaintiff; that he has read the foregoing complaint, knows the contents thereof, and the matters therein stated are true, of his own knowledge, except such as are stated on information and belief, and, as to such, he believes it to be true.

G. L. Hickey.

Subscribed and sworn to before me this 18th day of August, 1916.

(Seal)

Chas. A. Root,  
Notary Public.

Endorsed: In the District Court of the United States for the District of Oregon. (Title of Cause.)



Amended Complaint. Filed Nov. 2, 1916. G. H. Marsh, Clerk.

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And afterwards, to-wit, on the 11th day of November, 1916, there was duly filed in said court an answer in words and figures as follows, to-wit:

ANSWER.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

vs.

Portland Feeder Company, a corporation,  
Defendant.

Now comes the defendant and answers the complaint herein as follows:

It admits the allegations of paragraphs I and II of the complaint concerning the organization and business of plaintiff and defendant.

Except as herein admitted, defendant denies each and every allegation of the complaint.

Wherefore, defendant demands that plaintiff take nothing by this action, and that it have judgment for costs and its disbursements herein.

Carey & Kerr, and  
Charles A. Hart,  
Attorneys for Defendant.

State of Oregon, County of Multnomah, ss:

I, R. G. Assmann, being first duly sworn, depose and say that I am secretary of Portland Feeder Company, defendant in the above entitled action; that I have read the foregoing answer, know the contents thereof, and that the same is true, as I verily believe.

R. G. Assmann.

Subscribed and sworn to before me this 11th day of November, 1916.

(Seal)

C. A. Hart,  
Notary Public for Oregon.

My commission expires May 4, 1920.

Endorsed: Filed Nov. 11, 1916. G. H. Marsh,  
Clerk.

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And afterwards, to-wit, on the....day of April, 1917, there was duly filed in said court a stipulation in words and figures as follows, to-wit:

STIPULATION.

Docket 7232.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

vs.

Portland Feeder Company, a corporation,  
Defendant.

It is hereby stipulated by and between Charles

A. Hart, attorney for the defendant Portland Feeder Company, and W. A. Robbins, one of the attorneys for the plaintiff Oregon Short Line Railroad Company, that trial by jury is hereby waived in the above entitled case and we hereby consent to said case being tried by the court.

Dated at Portland, Oregon, this 16th day of April, 1917.

Charles A. Hart,  
Attorney for Defendant.  
W. A. Robbins,  
Of Attorneys for Plaintiff.

Endorsed: Filed April 20, 1917. G. H. Marsh,  
Clerk.

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And afterwards on the 16th day of April, 1917, the same being the 37th judicial day of the regular March term of said court: present the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

A jury having been duly waived by written stipulation of the parties made and filed before said time of trial, said action proceeded to trial before the Honorable Charles E. Wolverton, Judge of said court without a jury.

And afterwards on the 17th day of September, 1917, the same being the 66th judicial day of the regular July term of said court; present the Honorable

Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

OPINION.

In the District Court of the United States for the  
District of Oregon.

No. 7233.

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,  
Defendant.

No. 7232.

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

vs.

Portland Feeder Company, a corporation,  
Defendant.

A. C. Spencer and W. A. Robbins for Plaintiff,  
Carey & Kerr and Charles A. Hart for Defendants.  
Wolverton, District Judge:

These cases were instituted to recover certain balances alleged to be due plaintiff as freight for shipments of cattle, arising by reason of alleged erroneous computations of freight when the shipments were made and settled for; the plaintiff being required to institute the actions under the

Federal statutes. Several shipments are involved, a statement as to one of which will suffice for illustration of the whole.

Forty-four carloads of cattle were shipped from Hereford, Texas, to Amarillo, Texas, the latter being a station on the Pecos & Northern Texas Railway, where the shipment was combined into 43 cars, 27 of which were transported thence over the lines of connecting carriers to Pocatello, Idaho, and the remaining 16 to Butte, Montana, where they were delivered to the shipper.

The plaintiff claims that, under Joint Live Stock Tariff No. 100-A, then in force, the proper charges on these shipments are made up as follows:

Local from Hereford to Amarillo, \$26.40 per car, and from Amarillo to Pocatello, \$116.50, making a total of \$142.90 per car for shipment of the 27 cars. To Butte, the same local from Hereford to Amarillo, to which is added \$125.00 to Dillon, Montana, and the local from Dillon to Butte, \$19.80; total, \$171.20.

The entire controversy centers about the local charge of \$26.40 from Hereford to Amarillo, the defendants insisting that Hereford is a common point with Amarillo, and that the rate designated under section 2 of the tariff constitutes the entire rate from Hereford to Pocatello. This depends



upon a proper construction of the tariff. Referring to section 1 thereof, under the head of "The Pecos & Northern Texas Ry. Co.," will be found lists of stations common with Amarillo, the rate basis being Amarillo; and other lists of stations carrying differentials with Amarillo, that is to say, the tariff indicating that certain sums should be added to or deducted from the Amarillo rate basis. By a note on page 24, it is explained that the differentials shown in section 1 are to be added to or deducted from the Amarillo rates as shown in section 2, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69. By the same note, it is further explained that, where no differentials are shown, the Amarillo rates as shown in section 2 are to be applied as indicated. By another note, explanatory of section 2, it is stated that rates shown in section 2, in columns headed "Amarillo," are to be applied from stations shown in section 1 as taking Amarillo rate basis, or same are to be used as a basis for arriving at through rates from stations shown in section 1 as taking differentials over or under Amarillo rates, where application and routing is provided on pages 56 to 69, inclusive, from such point of origin to destination station. On page 53 is found another note explaining application of rates, which reads:

“Rates provided herein from points of origin shown in Section No. 1 to points of destination shown in Section No. 2, will apply only via the routes indicated in chart on page 57, except as provided in Item 350.”

The exception is without application here. Note 1 to the above explanation further provides:

“Where route number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in Section No. 3.”

These several explanatory notes respecting the application of the tariff must be construed together to ascertain their true meaning. Reading the explanatory note to section 1 by itself, and without reference to the succeeding notes, its meaning would appear to be plain that where there were differentials the rates shown in section 2 would not apply, unless the routing was provided on pages 56 to 69; but that, where there were no differentials shown, the shipment would take the section 2 rates without regard to whether the application and routing were provided on pages 56 to 69 or not. The note to section 2 merely emphasizes the thought that shipments from stations carrying differentials with Amarillo will take the through rate only where the application and routing are provided for on pages 56 to 69.

When, however, we turn to the note on page 56 respecting the application of rates, we are advised that rates from points of origin shown in section 1 to points of destination shown in section 2 will apply only via the routes indicated on page 57. This is a specific declaration, general in its scope, without reference to differentials, that the rates so provided will apply only via the routes indicated on page 57. The note thereto is but a reinforcement of the idea. Page 57 is, of course, included within the limitations of pages 56 to 69. So that these later explanatory notes are but a development of the intention which possessed the rate-maker from the beginning, and that must be construed to be that shipments from Amarillo common points, whether carrying a differential or not, shall not take the through rate unless where application and routing are provided on pages 56 to 69.

Recurring again to note to section 1, page 24, the words "as indicated" in the last clause as applying "where no differentials are shown," are susceptible of a construction, though not the natural one viewing the context, as signifying or denoting a reference to the preceding clause and also to the note to section 2, page 32, as this latter note refers back to the item on page 24. So that the aforesaid latter clause would read that the rates shown in section 2 are to be applied as indicated by these explanatory notes, and not by section 2. This idea

harmonizes the seemingly inconsistent and incongruous explanatory notes.

But whatever may be the true rendering of the notes to sections 1 and 2, the notes on page 56 explaining the "application of rates" are directly applicable to the present controversy, as no Oregon Short Line Railroad routing is shown of shipments coming from and over the Pecos & Northern Texas Railway on page 57; and, as we have seen, the regulation is general, and specifically limits the application of rates from points in section 1 to points of destination in section 2 to the routes indicated in the chart on page 57.

This construction of the tariff results in a finding for the plaintiff in each cause of action, and upon all the counts as prayed. The findings will be general, but judgment thereon will be withheld until the defendants have had an opportunity to present such findings as they may deem essential for reserving such questions for review as they may desire.

Endorsed: Filed Sept. 17, 1917. G. H. Marsh, Clerk. By K. F. Frazer, Deputy.

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And afterwards, to-wit, on Monday, the 17th day of September, 1917, the same being the sixty-sixth judicial day of the regular July term of said court, present the Honorable Charles E. Wolverton, United



States District Judge presiding, the following proceedings were had in the said cause, to-wit:

In the District Court of the United States for the  
District of Oregon,

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

This cause was tried by the court before the Honorable Charles E. Wolverton, District Judge, on the merits, and now at this time the court files its opinion and findings of fact in words and figures as follows, to-wit:

"The above cause having been submitted to the court for decision without the intervention of a jury and the court now being sufficiently advised finds for the plaintiff in the sum of \$1,116.95.

(Signed) CHAS. E. WOLVERTON,

Judge.

Whereupon it is ordered that judgment upon the said findings be and the same is hereby withheld until the further order of this court.

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And afterwards, to-wit, on the 29th day of September, 1917, there was duly filed in said court motion for entry of defendant's findings of fact and



conclusions of law in words and figures as follows, to-wit:

MOTION FOR ENTRY OF DEFENDANT'S  
FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

Now comes defendant and moves the court for an order adopting and making and filing the following as its Findings of Fact and Conclusions of Law in the above entitled action:

FINDINGS OF FACT.

*First Cause of Action.*

I.

Plaintiff is a corporation organized and existing under the laws of the State of Utah, and during the times stated in the complaint was engaged in the business of transporting freight and passengers as a common carrier in the states of Utah, Wyoming, Idaho and Montana, and in such business was subject to the Act to Regulate Commerce approved February 4, 1887, and acts amendatory thereof and

supplementary thereto, and was at all of said times engaged in the transportation of freight for hire as a common carrier in connection with other common carriers from points in the State of Texas and elsewhere to points in the states of Idaho and Montana, and particularly from Hereford, in the State of Texas, to Pocatello, in the State of Idaho, and from Hereford, in the State of Texas, to Butte, in the State of Montana.

## II.

Defendant is a corporation organized and existing under the laws of the State of Oregon.

## III.

On or about September 14, 1912, A. C. Greenameyer delivered to Pecos and Northern Texas Railway Company at Hereford, in the State of Texas, thirty-six carloads of cattle for transportation by freight from Hereford, Texas, to Red Rock, Montana, over the line of the Panhandle & Santa Fe Railway Company to Amarillo, Texas, and thence over the lines of connecting carriers to the line of the Oregon Short Line Railroad Company, plaintiff herein, there to be delivered at Red Rock, Montana, to Portland Feeder Company, defendant herein; and the said railroads, as connecting carriers, thereupon transported the said thirty-six carloads of cattle from Hereford, Texas, to Amarillo, Texas, and thence to Monida, in the State of Montana, in accordance with diversion instructions issued by de-

fendant to plaintiff, at which last-mentioned place the said thirty-six carloads of cattle, upon the order of defendant, were delivered to the defendant by plaintiff.

#### IV.

At the conclusion of said transportation defendant paid to plaintiff the sum of \$4,986.00, upon the demand of plaintiff, to cover the charges of plaintiff and its connecting carriers for the transportation of said livestock from Hereford, Texas, to Red Rock, Montana.

#### V.

Thereafter and on or about the first day of April, 1915, plaintiff made demand upon defendant for additional freight charges, and for the first time stated to defendant that plaintiff and its connecting carriers claimed that an additional charge was due for the transportation, to-wit, a charge of \$26.40 per car for the transportation from Hereford, Texas, to Amarillo, Texas.

#### VI.

At the time of the transportation of defendant's cattle plaintiff and its connecting carriers had duly filed with the Interstate Commerce Commission of the United States, and had posted and published, pursuant to provisions of the Act to Regulate Commerce, tariffs establishing the lawful charges to be made to all persons for the transportation of

cattle in carload lots from Hereford, Texas, to Red Rock, Montana. The tariff so stating said charges was known as Index No. 2050, Joint Live Stock Tariff 100-A, W. A. Poteet, I. C. C. No. 265, effective August 29, 1912. Said tariff provided a through rate of \$118.50 from Hereford, Texas, to Red Rock, Montana. Said rate was plainly specified by said tariff as applicable to transportation between the points named. By an explanatory note subsequently made in said tariff it was stated that through rates previously shown would apply only via routes indicated in a chart which followed, and in said chart no through route was shown from Hereford, Texas, on the line of the Pecos and Northern Texas Railway, and Red Rock, Montana, on the line of plaintiff company; but no reference was given in the positive statement in said tariff of the through rates applicable to such shipments to the footnote referred to; and a preceding note in said tariff explained that the routing limitation referred to applied to stations taking a differential over or under Amarillo, Hereford not being such a station. The freight charges collected by plaintiff at the conclusion of the transportation were based on said through rate of \$118.50 per car.

*Second Cause of Action.*

I.

Plaintiff is a corporation organized and existing under the laws of the State of Utah, and during



the times stated in the complaint was engaged in the business of transporting freight and passengers as a common carrier in the states of Utah, Wyoming, Idaho and Montana, and in such business was subject to the Act to Regulate Commerce approved February 4, 1887, and acts amendatory thereof and supplementary thereto, and was at all of said times engaged in the transportation of freight for hire as a common carrier in connection with other common carriers from points in the State of Texas and elsewhere to points in the states of Idaho and Montana, and particularly from Hereford, in the State of Texas, to Pocatello, in the State of Idaho, and from Hereford, in the State of Texas, to Butte, in the State of Montana.

## II.

Defendant is a corporation organized and existing under the laws of the State of Oregon.

## III.

On or about the 29th day of August, 1912, A. G. Greenameyer delivered to Pecos and Northern Texas Railroad Company, at Abernathy, Texas, thirty-two carloads of cattle for transportation from Abernathy, Texas, to Pocatello, Idaho, over the line of the Panhandle & Santa Fe Railway Company, to Amarillo, Texas, and thence over the lines of connecting carriers to the line of the Oregon Short Line Railroad Company, plaintiff herein, there to be delivered at Pocatello, Idaho, to Portland Feeder



Company, defendant herein; and the said railroads, as connecting carriers, thereupon transported said thirty-two carloads of cattle from Abernathy, Texas, to Amarillo, Texas, and thence to Pocatello, Idaho, at which last-mentioned place twenty-one of said thirty-two carloads of cattle, upon the order of defendant, were delivered to the defendant by this plaintiff, and thereupon defendant ordered this plaintiff to divert and transport eleven carloads of said thirty-two carloads of cattle to American Falls, Idaho, and plaintiff thereupon transported the said eleven carloads of cattle to American Falls, Idaho, at which place the said eleven carloads of cattle were delivered to the defendant by this plaintiff.

#### IV.

At the conclusion of said transportation defendant paid to plaintiff the sum of \$4,522.00, upon demand of plaintiff, to cover the charges of plaintiff and its connecting carriers for the transportation of said livestock from Abernathy, Texas, to Pocatello, Idaho.

#### V.

Thereafter and about the first day of April, 1915, plaintiff made demand upon defendant for additional freight charges, and for the first time stated to defendant that plaintiff and its connecting carriers claimed that an additional charge was due for the transportation, to-wit, a charge of

\$39.60 per car for the transportation from Abernathy, Texas, to Amarillo, Texas.

## VI.

At the time of the transportation of defendant's cattle, plaintiff and its connecting carriers had duly filed with the Interstate Commerce Commission of the United States, and had posted and published, pursuant to provisions of the Act to Regulate Commerce, tariffs establishing the lawful charges to be made to all persons for the transportation of cattle in carload lots from Abernathy, Texas, to Pocatello, Idaho. The tariff so stating said charges was known as Index No. 2050, Joint Live Stock Tariff 100-A, W. A. Poteet, I. C. C. No. 265, effective August 29, 1912. Said tariff provided a through rate of \$116.50 from Abernathy to Pocatello. Said rate was plainly specified by said tariff as applicable to transportation between the points named. By an explanatory note subsequently made in said tariff it was stated that through rates previously shown would apply only via routes indicated in a chart which followed, and in said chart no through route was shown from Abernathy, Texas, on the line of the Pecos and Northern Texas Railway and Pocatello, Idaho, on the line of plaintiff company; but no reference was given in the positive statement in said tariff of the through rates applicable to such shipments to the footnote referred to. The freight charges collected by plaintiff at

the conclusion of the transportation were based on said through rate of \$116.50 per car.

## CONCLUSIONS OF LAW.

### I.

The tariff of plaintiff and its connecting carriers duly filed and published according to law and in force at the time of defendant's shipments was ambiguous in that it justified the charges actually collected, to-wit, on a basis of \$118.50 per car as to the first cause of action and \$116.50 per car as to the second cause of action, and that in a subsequent portion thereof it undertook to deny said through rates and require the additional payment sued for in this action. Because of such ambiguity, the lower rates were the ones applicable and were the only lawful charges established by said tariffs for the transportation of defendant's shipment.

### II.

Defendant is entitled to a dismissal of this action and for judgment for costs and its disbursements.

Carey & Kerr, and  
Charles A. Hart,  
Attorneys for Defendant.

Endorsed: Filed Sept. 29, 1917. G. H. Marsh,  
Clerk.

And afterwards, to-wit, on Saturday, the 29th day of September, 1917, the same being the seventy-seventh judicial day of the regular July term of said court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

### JUDGMENT.

No. 7232.

Now at this time this cause coming on for entry of judgment herein, plaintiff appearing by W. A. Robbins, one of its attorneys, and defendant appearing by C. A. Hart, one of its attorneys, and it appearing to the court that the respective parties, through their attorneys, entered into a stipulation in writing waiving a jury, and it therefore appearing that said case was called for trial before the Honorable Judge Wolverton on April 16, 1917, and at the conclusion of the trial the court took the case under advisement and requested the attorneys for the respective parties to submit memorandum briefs showing their theories of the application of the tar-

iffs in question, and thereafter and on the 17th day of September, 1917, the court being fully advised in the premises, filed its finding in favor of the plaintiff in words and figures as follows, to-wit: (omitting title) :

“The above cause having been submitted to the court without intervention of a jury, the court being now fully advised, finds for the plaintiff in the sum of \$1,116.95.

“CHARLES E. WOLVERTON,  
“United States District Judge.”

It further appearing to the court that on September 29, 1917, defendant served and filed in this court and cause, its motion for entry of defendant's findings of fact and conclusions of law, which motion was on said date, presented to and overruled by the court, to which order defendant excepted, and its exception was allowed, and thereupon plaintiff moved for a judgment in its favor, upon the findings heretofore filed, by the court in favor of the plaintiff. It is therefore,

Considered, Ordered and Adjudged, that the plaintiff Oregon Short Line Railroad Company do have and recover of and from the Portland Feeder Company, the sum of \$1,116.95, together with interest thereon from September 17, 1917, until paid, and for plaintiff's costs and disbursements incurred herein, taxed and allowed at \$20, and that execution issue therefor.



Dated at Portland, Oregon, this 29th day of September, 1917.

CHAS. E. WOLVERTON,  
United States District Judge.

Filed September 29, 1917. G. H. Marsh, Clerk.

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And afterwards, to-wit, on the 29th day of October, 1917, there was duly filed in said court, bill of exceptions in words and figures as follows, to-wit:

BILL OF EXCEPTIONS.

No. 7232.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,  
Plaintiff,

vs.

Portland Feeder Company, a corporation,  
Defendant.

Be it remembered that on the 16th day of April, 1917, this action came before the court, Honorable Charles E. Wolverton, Judge, for trial, plaintiff appearing by W. A. Robbins, Esquire, its attorney, and defendant appearing by Messrs. Carey and Kerr and Charles A. Hart, its attorneys. Whereupon the following proceedings were had:

It appearing that by written stipulation of the parties duly made and filed before said time of

trial a jury having been duly waived, the action proceeded to trial before the Honorable Charles E. Wolverton, judge of said court, without the intervention of a jury. Plaintiff offered evidence in support of the issues made by its complaint and defendant offered testimony in support of the defenses alleged in its answer. There is attached hereto, marked "Exhibit A," and hereby made a part hereof a full and complete stenographic record of the testimony offered and received upon said trial, and of all of the proceedings had in the trial of said cause down to the close of the testimony offered by each of the parties respectively.

Thereafter said action having been taken under advisement by the court, Honorable Charles E. Wolverton, judge, an opinion was handed down and duly filed herein directing and making a general finding in favor of plaintiff, but deferring the entry of judgment until the defendant was given an opportunity to present findings deemed essential for observing questions for review.

Thereafter defendant duly served and filed its motion for the entry of special findings and conclusions of law in its favor, which said motion is in the following form, to-wit:

"Now comes defendant and moves the court for an order adopting and making and filing the following as its Findings of Fact and Conclusions of Law in the above entitled action:

## FINDINGS OF FACT.

*First Cause of Action.*

## I.

"Plaintiff is a corporation organized and existing under the laws of the State of Utah, and during the times stated in the complaint was engaged in the business of transporting freight and passengers as a common carrier in the states of Utah, Wyoming, Idaho and Montana, and in such business was subject to the Act to Regulate Commerce approved February 4, 1887, and acts amendatory thereof and supplementary thereto, and was at all of said times engaged in the transportation of freight for hire as a common carrier in connection with other common carriers from points in the State of Texas and elsewhere to points in the states of Idaho and Montana, and particularly from Hereford, in the State of Texas, to Pocatello, in the State of Idaho, and from Hereford, in the State of Texas, to Butte, in the State of Montana.

## II.

"Defendant is a corporation organized and existing under the laws of the State of Oregon.

## III.

"On or about September 14, 1912, A. C. Greenameyer delivered to Pecos and Northern Texas Railway Company at Hereford, in the State of Texas, thirty-six carloads of cattle for transportation by

freight from Hereford, Texas, to Red Rock, Montana, over the line of the Panhandle & Santa Fe Railway Company to Amarillo, Texas, and thence over the lines of connecting carriers to the line of the Oregon Short Line Railroad Company, plaintiff herein, there to be delivered at Red Rock, Montana, to Portland Feeder Company, defendant herein; and the said railroads, as connecting carriers, thereupon transported the said thirty-six carloads of cattle from Hereford, Texas, to Amarillo, Texas, and thence to Monida, in the State of Montana, in accordance with diversion instructions issued by defendant to plaintiff, at which last-mentioned place the said thirty-six carloads of cattle, upon the order of defendant, were delivered to the defendant by plaintiff.

#### IV.

“At the conclusion of said transportation defendant paid to plaintiff the sum of \$4,986.00, upon the demand of plaintiff, to cover the charges of plaintiff and its connecting carriers for the transportation of said livestock from Hereford, Texas, to Red Rock, Montana.

#### V.

“Thereafter and on or about the first day of April, 1915, plaintiff made demand upon defendant for additional freight charges, and for the first time stated to defendant that plaintiff and its connecting carriers claimed that an additional charge



was due for the transportation, to-wit, a charge of \$26.40 per car for the transportation from Hereford, Texas, to Amarillo, Texas.

## VI.

“At the time of the transportation of defendant’s cattle plaintiff and its connecting carriers had duly filed with the Interstate Commerce Commission of the United States, and had posted and published, pursuant to provisions of the Act to Regulate Commerce, tariffs establishing the lawful charges to be made to all persons for the transportation of cattle in carload lots from Hereford, Texas, to Red Rock, Montana. The tariff so stating said charges was known as Index No. 2050, Joint Live Stock Tariff 100-A, W. A. Poteet, I. C. C. No. 265, effective August 29, 1912. Said tariff provided a through rate of \$118.50 from Hereford, Texas, to Red Rock, Montana. Said rate was plainly specified by said tariff as applicable to transportation between the points named. By an explanatory note subsequently made in said tariff it was stated that through rates previously shown would apply only via routes indicated in a chart which followed, and in said chart no through route was shown from Hereford, Texas, on the line of the Pecos and Northern Texas Railway, and Red Rock, Montana, on the line of plaintiff company; but no reference was given in the positive statement in said tariff of the through rates applicable to such shipments to the



footnote referred to; and a preceding note in said tariff explained that the routing limitation referred to applied to stations taking a differential over or under Amarillo, Hereford not being such a station. The freight charges collected by plaintiff at the conclusion of the transportation were based on said through rate of \$118.50 per car.

*Second Cause of Action.*

I.

“Plaintiff is a corporation organized and existing under the laws of the State of Utah, and during the times stated in the complaint was engaged in the business of transporting freight and passengers as a common carrier in the states of Utah, Wyoming, Idaho and Montana, and in such business was subject to the Act to Regulate Commerce approved February 4, 1887, and acts amendatory thereof and supplementary thereto, and was at all of said times engaged in the transportation of freight for hire as a common carrier in connection with other common carriers from points in the State of Texas and elsewhere to points in the states of Idaho and Montana, and particularly from Hereford, in the State of Texas, to Pocatello, in the State of Idaho, and from Hereford, in the State of Texas, to Butte, in the State of Montana.

II.

“Defendant is a corporation organized and existing under the laws of the State of Oregon.

## III.

"On or about the 29th day of August, 1912, A. G. Greenameyer delivered to Pecos and Northern Texas Railroad Company, at Abernathy, Texas, thirty-two carloads of cattle for transportation from Abernathy, Texas, to Pocatello, Idaho, over the line of the Panhandle & Santa Fe Railway Company, to Amarillo, Texas, and thence over the lines of connecting carriers to the line of the Oregon Short Line Railroad Company, plaintiff herein, there to be delivered at Pocatello, Idaho, to Portland Feeder Company, defendant herein; and the said railroads, as connecting carriers, thereupon transported said thirty-two carloads of cattle from Abernathy, Texas, to Amarillo, Texas, and thence to Pocatello, Idaho, at which last-mentioned place twenty-one of said thirty-two carloads of cattle, upon the order of defendant, were delivered to the defendant by this plaintiff, and thereupon defendant ordered this plaintiff to divert and transport eleven carloads of said thirty-two carloads of cattle to American Falls, Idaho, and plaintiff thereupon transported the said eleven carloads of cattle to American Falls, Idaho, at which place the said eleven carloads of cattle were delivered to the defendant by this plaintiff.

## IV.

"At the conclusion of said transportation defendant paid to plaintiff the sum of \$4,522.00, upon de-

mand of plaintiff, to cover the charges of plaintiff and its connecting carriers for the transportation of said livestock from Abernathy, Texas, to Pocatello, Idaho.

V.

"Thereafter and about the first day of April, 1915, plaintiff made demand upon defendant for additional freight charges, and for the first time stated to defendant that plaintiff and its connecting carriers claimed that an additional charge was due for the transportation, to-wit, a charge of \$39.60 per car for the transportation fom Abernathy, Texas, to Amarillo, Texas.

VI.

"At the time of the transportation of defendant's cattle, plaintiff and its connecting carriers had duly filed with the Interstate Commerce Commission of the United States, and had posted and published, pursuant to provisions of the Act to Regulate Commerce, tariffs establishing the lawful charges to be made to all persons for the transportation of cattle in carload lots from Abernathy, Texas, to Pocatello, Idaho. The tariff so stating said charges was known as Index No. 2050, Joint Live Stock Tariff 100-A, W. A. Poteet, I. C. C. No. 265, effective August 29, 1912. Said tariff provided a through rate of \$116.50 from Abernathy to Pocatello. Said rate was plainly specified by said tariff as applicable to transportation between the points

named. By an explanatory note subsequently made in said tariff it was stated that through rates previously shown would apply only via routes indicated in a chart which followed, and in said chart no through route was shown from Abernathy, Texas, on the line of the Pecos and Northern Texas Railway and Pocatello, Idaho, on the line of plaintiff company; but no reference was given in the positive statement in said tariff of the through rates applicable to such shipments to the footnote referred to. The freight charges collected by plaintiff at the conclusion of the transportation were based on said through rate of \$116.50 per car.

## CONCLUSIONS OF LAW.

### I.

"The tariff of plaintiff and its connecting carriers duly filed and published according to law and in force at the time of defendant's shipments was ambiguous in that it justified the charges actually collected, to-wit, on a basis of \$118.50 per car as to the first cause of action and \$116.50 per car as to the second cause of action, and that in a subsequent portion thereof it undertook to deny said through rates and require the additional payment sued for in this action. Because of such ambiguity, the lower rates were the ones applicable and were the only lawful charges established by said tariffs for the transportation of defendant's shipment.



## II.

"Defendant is entitled to a dismissal of this action and for judgment for costs and its disbursements."

Thereafter and on the 29th day of September, 1917, this action came before the court upon plaintiff's motion for entry of judgment upon the general findings of the court herein and upon a motion of defendant for findings and judgment in its favor, and the court having heard the parties thereupon made and entered its order overruling the motion of defendant for findings and judgment in its favor and granting the motion of plaintiff for the entry of judgment in its favor. To the order thus made overruling its motion for findings and judgment in its favor defendant excepted and an exception was duly allowed.

Thereupon on said 29th day of September, 1917, judgment was duly entered in favor of plaintiff upon said general findings.

## ORDER SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions having been presented to the court this 29th day of October, 1917, within the time allowed by order of the court to present the same and it appearing that said bill of exceptions was delivered to the clerk and served upon the plaintiff herein within the time allowed by order of this court, and that no amendments



have been offered and no objection made to said bill of exceptions by plaintiff, said bill of exceptions is hereby certified to contain a full and correct record of all of the evidence and exhibits necessary for the presentation of the exception herein noted, and is a record of any and all other matters material to the decision of defendant's writ of error.

Said bill of exceptions is hereby allowed in the foregoing form this 29th day of October, 1917.

CHAS. E. WOLVERTON,  
District Judge.

EXHIBIT A.

No. 7232.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corpora-  
tion,  
Plaintiff,

vs.

Portland Feeder Company, a corporation,  
Defendant.

No. 7233.

Oregon Short Line Railroad Company, a corpora-  
tion,  
Plaintiff,

vs.

Portland Cattle Loan Company, a corporation,  
Defendant.

Before Judge Wolverton.

Portland, Oregon, April 16, 1917-May 14, 1917.

W. A. Robbins for Plaintiff.

C. A. Hart for Defendants.

S. J. H. French .....	10	126
Geo. F. Anderson .....	43	
J. H. Lothrop .....	73	
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Portland, Oregon, April 16, 1917. 2 p. m.

Mr. Hart: If your honor please, I should like  
to inquire whether it is the desire of the plaintiff

to try the two cases together. There are two cases of similarity.

Mr. Robbins: I think the cases should be tried together, your honor, but of course we should expect separate findings.

Court: You do not care to have them consolidated?

Mr. Robbins: I have no objection; either way that suits the court. The same witnesses will testify in both cases.

Court: I was wondering whether it would be better to consolidate the cases, or simply to make findings in both cases.

Mr. Robbins: I think there should be separate findings.

Court: Well, they can be tried together, and the court can make findings accordingly.

Mr. Robbins: I should think that would be the better plan. Don't you, Mr. Hart?

Mr. Hart: I guess so.

Mr. Robbins: Now, if the court pleases, in this case of *Oregon Short Line Railroad Company v. Portland Cattle Loan Company*, we filed an amended complaint, and I just discovered today that the stenographer in transcribing this complaint has made some errors in some of the figures. I would like to correct those figures by interlineation.

Court: Have you any objection to that, Mr. Hart?

Mr. Hart: I presume not, your honor. I would like to know what they are. These are under-charge cases. Your honor probably knows what they are, and knows that, while the public policy may require strict enforcement of tariffs, necessarily there is individual hardship, and it is our position, of course, that we are not going to concede anything in these cases. I don't want to interpose any unnecessary objections; at the same time, I want to preserve every right.

Court: I understand these are clerical errors.

Mr. Robbins: These are clerical errors, which change the figures some.

Court: Well, you can point them out to Mr. Hart. When he has had a chance to see them, the court will make a ruling.

Mr. Robbins: I can make them right now.

Mr. Hart: I have no objection.

#### STATEMENT OF CASE.

Court: Which case are you proceeding on now?

Mr. Robbins: The Cattle Loan case, your honor. I will offer the deposition of R. W. Kelley.

Mr. Hart: What does this go to show, may I ask?

Mr. Robbins: This covers the transaction of Butte.

Mr. Hart: Well, strictly, of course, we ought to have first the proof of the shipment, and that is the proof that has gone astray, as I understand it.

Mr. Robbins: That will be here after awhile. I will have to put it on this way until these other depositions come. They are floating around some place.

Court: Do you say those depositions are in town?

Mr. Robbins: They are supposed to be in town. They were mailed to the other court. The boy just tells me they are around town, and they are looking for them now.

Court: You might go on, then.

(Reading of deposition of R. W. Kelley.)

Court: Mr. Hart, will you admit that that shipment of 16 cars was made?

Mr. Hart: We will admit at least what this deposition aims to show. We will admit that the cars which have been just described were received in Butte, and were delivered to the Chicago, Milwaukee & Puget Sound Company for further transportation to Piedmont, Montana, and that Mr. Kelley, as agent for the Oregon Short Line Company, obtained a receipt from the Chicago, Milwaukee & Puget Sound Company for \$345.60, covering the freight from Butte to Piedmont.

(Reading of deposition completed.)



Mr. Hart: Now, that is the end of that deposition, and I move to strike it out for this reason, if your honor please: The complaint alleges that this particular shipment of 16 cars was destined to Butte, or was diverted to Butte and delivered to the defendant there. The proof shows that this shipment was not delivered to the defendant at Butte, but went on to Piedmont, Montana, on the line of the Chicago, Milwaukee & Puget Sound Railroad; and there is a vital point in that difference. The claim of the Oregon Short Line Company in this case is that they have got to collect this Hereford-Amarillo rate because there was no through rate, through route, between the Pecos & Northern Texas, where they originate, and the Short Line, where they were delivered; but these shipments were delivered on the line of the Chicago, Milwaukee & Puget Sound, and there was a through route between Hereford, on the Pecos & Northern, and the Milwaukee; so that it seems to me that the proof now is inconsistent with the complaint, and in a material respect.

Mr. Robbins: There is nothing inconsistent about that, your honor. It shows that 16 cars moved from Hereford to Butte, and when they got to Butte, the consignee sent them on to Piedmont, and that is the purpose of offering this deposition, to show these 16 cars so moved.

Court: You are seeking to collect this tariff on the shipment from Hereford to Butte, and not beyond that?

Mr. Robbins: To Butte and not beyond.

Court: Has that tariff been arranged beyond that?

Mr. Robbins: That moved under local, as I understand it. That is not involved.

Mr. Hart: This proof shows the shipment went right through.

Mr. Robbins: That local from Butte to Piedmont is not involved in this transaction.

Court: Let me understand. In this shipment there was included a local from Hereford to Amarillo, through rate from Amarillo to Butte, and then after that, from Butte to Piedmont, a local again?

Mr. Robbins: Yes.

Mr. Hart: But the point of my objection is this: The reason they are asking us to pay a local from Hereford to Amarillo is because they say the tariff provided no through rate, no through route between Hereford and the destination of these shipments, and they say in their complaint that the destination of this shipment was Butte, and there being no through route between Hereford, on the Pecos & Northern, and Butte, on the Oregon Short Line, therefore they could not apply any through

rate, and they had to collect the local from Hereford to Amarillo. But it appears from this proof that these shipments did not go to Butte, but went through Butte to a point on the Milwaukee Railway. Now, this same tariff does show that there is a through route and a through rate from Hereford, in Texas, to points on the Milwaukee. So that you have got a material difference there, and you have got a situation which does not give rise to the necessity of this collection from Hereford to Amarillo.

Court: I will overrule the objection. You may have an exception.

Mr. Hart: It is not fair to ask your honor to pass on the whole record, but I wanted to make clear my point now.

Court: Yes, I understand. You claim, then, that the charge was a proper charge, because there was a through rate?

Mr. Hart: Yes, that is, as to these particular Butte cars. Now, that is not the main ground of our defense. I do not want to be understood that that is the only reason I am asserting that there was no necessity for collecting this Hereford-Amarillo rate.

Deposition of C. J. Kelley offered in evidence, and read, with exhibits thereto attached.

Mr. Robbins: I now offer the deposition of John Hamilton.

Mr. Hart: We will admit that Mr. John Hamilton has testified that he recalls a shipment of 43 cars of cattle, billed from A. G. Greenameyer, Hereford, Texas, to the Portland Cattle Loan Company, arriving in Pocatello in October, 1912, and that a representative of the Cattle Loan Company, either Mr. Burke or Mr. Fleming, made settlement of the freight charges there at that time; that his book record shows that transaction, and shows that the amount paid by the Cattle Loan Company was \$7693.25, and that this amount of \$7693.25 consisted of freight charges and feed charges.

Court: That is from Hereford to Butte?

Mr. Robbins: This is part of the 43 cars, yes, he is testifying about.

\* \* \* \* \*

Mr. Robbins: Now, we wish to offer that Exhibit E in evidence, your honor. It has just been marked for identification.

Mr. Hart: What is the purpose of it?

Mr. Robbins: It goes to show a portion of the shipment up there, and the charges that were collected on it.

Court: If I understand this right, there is no controversy about the shipments, nor is there any controversy about the amount of freight collected and the amount charged, and the difference is between the amount of freight charged and collected



and the amount of the freight which you claim ought to have been charged and ought to be paid. Cannot you agree upon a statement of that kind, and cut out all this evidence?

Mr. Robbins: I tried to, your honor, and do not see why we cannot. Counsel has practically admitted that, but since he does not specifically admit it, I am going to go through and try to prove the case.

Mr. Hart: I am ready to say to your honor now, I am free to admit all of the evidence, all of the allegations made with reference to this Pocatello-Butte transaction. That is, I am willing to admit everything that any of these witnesses at Pocatello and Butte can testify to. I do not want to fully admit everything with reference to the other end of it, because I want to see what that proof shows first, which I haven't had a chance to do.

Court: That is the Texas end of it?

Mr. Hart: Yes. But so far as the delivery of these shipments is concerned, so far as the collection of freight charges, all of the facts to which this Pocatello and Butte testimony is directed, I freely admit. I see no purpose in going over the testimony. I do not want to make any concession, or yield any point, that might be of disadvantage to my client. In this kind of a case, certainly if Mr. Robbins failed to prove his case, I ought to be able to take advantage of it. Now, then, I want to



facilitate the proof, and I want to agree to everything testified to by these witnesses.

Mr. Robbins: Well, that certainly will dispose of those witnesses there, your honor. If you will give me just a moment, I think I can dispose of most of these witnesses on that statement of counsel.

Court: The allegation in the complaint is that on or about the 28th day of September, 1912, this defendant caused Greenameyer to deliver to a certain railroad in the State of Texas 44 carloads of cattle. That is admitted, isn't it?

Mr. Hart: No, that is denied. They cannot prove that, if your honor pleases. There is a mistake there in their allegation. I want to see their proof on that score. But passing that, I want to admit most everything else. The point of it is this: That the allegation in the complaint is that this whole contract of shipment was made between Greenameyer and the Panhandle & Santa Fe Railway. That is not the fact. The shipment was made on the line of the Pecos & Northern Texas Railroad.

Court: Does that make any difference?

Mr. Hart: That is the foundation of the case. They are basing their case on the contract of shipment, and I have been waiting to see what their proof would be on that point. The rest of this stuff I do not care about.

Mr. Robbins: Your honor, that doesn't make a

particle of difference. The question is, was that shipment made, and did it take the rate applied to it? The only thing we have to decide is, did that shipment move, and is that the tariff rate applying on it?

Under Mr. Hart's admission, I can dispose of the proof of R. W. Kelley and C. J. Kelley—they are the Butte men. And that will dispose of John Hamilton, H. M. Perleywitz, J. F. Stewart, and W. E. Garvey, ticket agent at Pocatello. That will not dispose of L. R. Wood, though.

Mr. Hart: I admit that, too. Mr. Wood was auditor of the Short Line Railroad, and he testifies about the interline settlements.

Mr. Robbins: He admits interline settlements and the refunds. I don't see any need of reading that.

That is all the depositions we have here in the Cattle Loan case, up to this point. Now, we have some in the Feeder case.

Mr. Hart: The same admissions may be made in the Feeder case.

Mr. Robbins: Are they the same witnesses?

Mr. Rankin: Some witnesses, with the exception of the man receiving shipment at American Falls.

Mr. Robbins: That would be admitted also on the stipulation?

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Mr. Robbins: Are they the same witnesses?

Mr. Rankin: Some witnesses, with the exception of the man receiving shipment at American Falls.

Mr. Robbins: That would be admitted also on the stipulation?



Mr. Hart: Yes.

Mr. Robbins: That disposes of the depositions which we have here now, your honor.

Mr. Hart: If I had had an opportunity to look at the depositions, your honor, I could have told in a minute whether or not there was any point to be made about them. But the Texas depositions have not come. I have had no chance to see whether they make the proof wanted, or whether there is any point to be made about them, or whether I could at once make an admission that would simplify the procedure. Can't we go on with the proof of the rate?

Mr. Robbins: Does your honor want to go on? I will go ahead, if your honor says so, at this time.

Court: I would rather go ahead, if we can.

Mr. Robbins: All right. I will go ahead.

S. J. H. French, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Robbins:

Your name is S. J. H. French?

A. Yes.

Q. And what is your business, Mr. French?

A. I am special rate and tariff clerk of the O.-W. R. & N. Company at Portland.



Q. As special rate and tariff clerk, are you familiar with the tariffs of the other roads, connecting lines, etc.?

A. I am.

Q. Now, how many years' experience have you had in interpreting rates, Mr. French?

A. About fourteen years: six years with the Northern Pacific and some eight years with the O.-W. R. & N. Company.

Q. Six years with the Northern Pacific and eight years with the O.-W. R. & N Company, you say?

A. Directly connected with tariff and rate work, yes.

Q. And where is your headquarters at the present time?

A. Portland, Oregon.

Mr. Robbins: If the court pleases, at this time we desire to offer in evidence certified copies of the tariffs which are applicable in this case. They are contained in two different certificates here, certified by the secretary of the Interstate Commerce Commission, as provided by the act.

Court: Those are the tariff rates?

Mr. Robbins: Yes, your honor, these are tariffs that were in force and effect at the time these shipments moved as certified by the Interstate Commerce Commission.

Received without objection, and marked "Plaintiff's Ex. 1" and "Plaintiff's Ex. 2."

Q. Mr. French, I will ask you if you have examined Plaintiff's Exhibits 1 and 2, at my request, in connection with this case?

A. I have.

Q. I will ask you, what is the effective date of those tariffs?

A. They were filed with the Interstate Commerce Commission April 13, 1909; and they were in force August 29, September 14, and September 28, 1912, the dates these shipments moved.

Q. Now, Mr. French, referring to those tariffs, I will ask you to explain how the rate is made up from Hereford to Amarillo on a caload of stock, of cattle?

Mr. Hart: The Supreme Court of Oregon has held that expert testimony on the subject of the contents of these tariffs is not admissible, in the case of *O. R. & N. Co. v. Coolidge*, in 116 Pacific. I do not urge that decision on your honor here with any particular force, because I believe the tariffs perhaps are unintelligible, or may be unintelligible to your honor. At the same time, strictly speaking, the tariffs are here, and we are at liberty each side to argue what we think they mean, and it is for the court to say what they mean. Now, if the court feels that testimony of this kind will aid it, I have

no objection to make, although I want it understood, of course, that this witness is merely voicing the plaintiff's idea of what the tariffs mean.

Mr. Robbins: Right along that line, your honor, the United States Supreme Court has said that the public is charged with knowledge of the contents of those tariffs; and I do not think there is one per cent of the public can read a tariff. I have been in this business 12 years, and I cannot read a tariff, and I do not believe your honor can. Now, here is a man that has put in his life at that business. I am asking him what those tariffs show. I propose to show where he is reading from. That is all I am asking him to do.

Court: I was going to remark that tariffs are sometimes very hard to understand, and if you have an expert on the subject, it might enlighten the court.

Mr. Hart: Of course, I expect to put on an expert myself. If we have one on one side, I want one on the other. I am perfectly willing to admit them without such expert testimony, because I think we can enlighten the court as to our side of it.

Court: Very well, I would be very glad to hear both sides.

Q. Proceed, Mr. French.

A. Hereford, Texas, is 47 miles south of Amarillo, and, at the time these shipments moved was located on what was known as the Pecos & North-

ern Texas Railroad, now the Panhandle & Santa Fe Railroad. The rate on cattle from Hereford to Amarillo at the time these shipments moved was \$26.40 for 36 ft. 6 inch car, and that rate is made up by using the Santa Fe System distance table 9900, I. C. C. No. 4763, which was in force August 29, September 14 and September 28, 1912, the dates these shipments moved, and shows the distance from Hereford to Amarillo 47 miles. A. T. & S. F. Tariff, I. C. C. 5820, Santa Fe System No. 6016-E, provides rate of 12 cents per 100 pounds of cattle, carload.

Mr. Hart: You are now explaining the basis of this local rate?

A. I am.

Mr. Hart: Why is that necessary?

A. Because it is a factor in the through rate.

Mr. Hart: It isn't possible that is material.

A. Carload minimum 22,000 pounds for cars 36 feet 6 inches and over 34 feet, \$26.40 per car. That is the authority for the rate from Hereford to Amarillo.

Mr. Hart: Let me ask if that is shown in either of the two certified copies of the tariffs you have before you?

A. It is.

Q. Then the rate from Hereford to Amarillo is \$26.40 a car?

A. For 36 ft. 6 inch car.

Court: That is what you call the local rate?

A. That is the local rate, sir, from Hereford to Amarillo. That is the only rate, in fact, and was at the time these shipments moved from Hereford, to Amarillo, Texas.

Court: There is no through rate from Hereford?

A. There was no through rate from Hereford to these points of destination.

Q. Now, then, what do those exhibits show there the rate is from Hereford to Pocatello; that is, was on the date in question of course?

A. From Hereford to Pocatello the rate was \$116.50, for 36 ft. 6 inch car. This is provided, or rather shown, Index No. 2050, page 50, Joint Live Stock Tariff 100-A, W. A. Poteet, Agent, I. C. C. No. 265, in force August 29, September 14, and September 28, 1912; and provided this rate of \$116.50, from Amarillo to Pocatello.

Court: That is from Amarillo?

A. From Amarillo to Pocatello.

Court: That is from Amarillo, not from Hereford?

Mr. Robbins: He will explain that in just a moment, your honor. It is necessary for him to explain Amarillo to Pocatello first.

Court: Very well.

A. From Amarillo to Pocatello, the point shown



in the tariff, your honor, is Idaho Falls. Pocatello is intermediate with Idaho Falls, and under the intermediate application the rate to Idaho Falls applies as a maximum at Pocatello. By adding these two rates together, the \$26.40 from Hereford to Amarillo as provided in that Santa Fe tariff 6016-E, that I have just quoted, plus the rate of \$116.50 from Amarillo to Idaho Falls, which applies as a maximum at Pocatello, you have the through rate from Hereford to Pocatello of \$142.90, for 36 ft. 6 inch car.

Court: Idaho Falls is how far from Pocatello?

A. Idaho Falls is—well, it is about 50 miles, I should say.

Court: Do you say the same rate applies to Idaho Falls as applies to Pocatello?

A. Yes, sir.

Court: Very well.

Q. Now, then, what do those exhibits show the rate from Hereford to Butte?

A. Well, from Hereford to Butte you would use the same tariff reference as from Hereford to Amarillo, which authorized the rate of \$26.40 I previously quoted, plus rate of \$125 for 36 ft. 6 inch car from Amarillo to Dillon, as shown in index 2060, page 50, Joint Live Stock Tariff 100-A, W. A. Po-teet, Agent, I. C. C. 265, in force August 29, September 14, and September 28, 1912, the date these

shipments moved; that is the rate from Amarillo, Texas, to Dillon, \$125 for 36 ft. 6 inch cars, which, plus the rate of \$26.40 from Hereford to Amarillo, same size car, made the two factors, or the rate from Hereford to Dillon. The farthest point north on the O. S. L. is Dillon, Montana, to which rates are provided from Amarillo; therefore, we must add the local rate from Dillon to Butte in order to make the through rate. In other words, we have the three factors—\$26.40 Hereford to Amarillo, \$125 Amarillo to Dillon, and \$19.80 from Dillon to Butte. The latter rate is authorized Index No. 15, page 9, O. S. L. Local and Joint Tariff 3281, I. C. C. 1469, in force August 29, September 14, and September 28, 1912. This tariff provided a rate of \$18 for 30 ft. car Dillon to Butte, and Supplement No. 14 to the same tariff, effective March 7, 1912, provided 110 per cent of this rate for cars over 33 ft. 9 inches to and including 36 ft. 7 inches. That would include 36 ft. 6 in. car, which made the rate \$19.80 for 36 ft. 6 in. car from Dillon to Butte. By adding the three factors from Hereford we have a total of \$171.20 from Hereford to Butte.

Q. Then, your testimony, as I get it, is Hereford to Amarillo \$26.40?

A. Correct.

Q. Hereford to Pocatello is \$142.90?

A. Amarillo to Dillon is \$125, Dillon to Butte \$19.80, making a through rate of \$171.20. I am not

figuring on the Hereford-Pocatello, Mr. Robins; I am figuring on the Dillon-Butte rate. That was the last one you gave me.

Q. I know it is the last one, but I am going over these again.

A. All right.

Q. Now, you first testified the rate from Hereford to Amarillo was \$26.40?

A. Correct.

Q. Now, what did you say the rate was from Hereford to Pocatello?

A. I said the rate from Amarillo to Pocatello was \$116.50, if you are going back to that.

Q. What is the total? What is the total charge?

A. The total charge from Hereford to Pocatello—is that what you are wanting now?

Q. Yes.

A. \$142.90.

Q. That is exactly what I said. Now, then, you also testified that the rate from Hereford to Butte is \$171.20?

A. Correct.

Q. All right. Now, then, let us turn to the Feeder Company a minute. I am now referring to the first cause of action in the Feeder case. What does the exhibit show the rate to be from Hereford to Monida, Montana?

A. The rate from Hereford to Amarillo is \$26.40, as previously stated. The tariff authorities quoted are the same. From Amarillo, Texas, to Monida, Montana, the rate is \$118.50 for 36 ft. 6 in. car. That rate is carried Index 2056, page 50, Joint Live Stock Tariff 100-A, W. A. Poteet, Agent, I. C. C. 265, in force the dates of shipment, August 29, September 14, and September 28, 1912. And those two rates—\$26.40 from Hereford to Amarillo and \$118.50 from Amarillo to Monida, make the through rate of \$144.90.

Q. I am now referring to the second cause of action in the Feeder case. What does that exhibit show the rate would be from Abernathy, Texas, to Pocatello?

A. Abernathy, Texas, was located on the at that time Pecos & Northern Texas Railroad, 105 miles southeast of Amarillo, and the rate from Abernathy to Amarillo was \$39.60 for 36 ft. 6 in. car. That rate is carried, or rather the basis for that rate, the Santa Fe System Distance Table 9900, I. C. C. 4763, which shows the distance from Abernathy to Amarillo 105 miles, and A. T. & S. F. Tariff, I. C. C. 5820, Santa Fe System No. 6016-E, which provides rate of 18 cents per hundred on cattle, carload, minimum 22,000 pounds, for cars 36 ft. 6 in. and over 34 feet. From Amarillo, Texas, to Pocatello, Index No. 2050, page 50, Joint Live Stock Tariff, 100-A, W. A. Poteet, Agent, I. C. C.

265, in force August 29, September 14, and September 28, 1912 provides rate of \$116.50 from Amarillo to Pocatello. These two rates added together produce a total of \$156.10 the correct through rate.

Q. Now, how about the rate from Abernathy to American Falls?

A. From Abernathy to Amarillo the same tariff above referred to authorized a rate of \$39.60 for 36 ft. 6 in. car, and from Amarillo to Pocatello the same tariff authorizes—

Court: That is \$116.50?

A. Index 2050, page 50, Joint Live Stock Tariff No. 100-A, W. A. Poteet, Agent, I. C. C. 265, in force at date of shipment, provides the rate \$116.50 from Amarillo to Pocatello; that being the Idaho Falls rate, Pocatello being intermediate. From Pocatello to American Falls the rate is \$14 for 36 ft. car; the authority for this rate being Index 244, page 12, Local and Joint Freight Tariff, O. S. L. No. 2062-B, I. C. C. 1781, in force August 29, September 14, and September 28, 1912, the dates these shipments moved.

Court: What was that rate from Pocatello to American Falls?

A. \$14, sir. American Falls is 50 miles west of Pocatello, on the O. S. L., and we add that \$14 for that 50 miles off to the Pocatello rate. These three factors, \$39.60 Abernathy to Amarillo, \$116.50 Am-



arillo to Pocatello, and \$14 Pocatello to American Falls, produce the true rate of \$170.10.

Q. So on the second cause of action, your testimony is, then, that the rate from Abernathy to Pocatello is \$156.10 and from Abernathy to American Falls is \$170.10?

A. Correct.

Q. Now, Mr. French, on what line of railroad are Hereford and Abernathy located?

A. They are located on the, at the time of movement, Pecos & Northern Texas Railroad.

Q. And what is the fact as to whether or not Amarillo is a junction point?

A. And Amarillo, it is one of the points north on the Pecos & Northern Texas Railroad at that time, now the Santa Fe & Panhandle.

Q. What line of railroad, then, extends from Amarillo to Texline?

A. Fort Worth & Denver City extends from Amarillo to Texline, and the Colorado & Southern from Texline to Denver.

Q. And then what road from Denver to Granger?

A. From Denver to Granger the Union Pacific; from Granger to Pocatello the O. S. L.

Cross Examination.

Questions by Mr. Hart:

Mr. French, I don't just understand how you get

at this local rate of \$26.40 from Hereford to Amarillo. Will you please take the tariff showing that rate and point it out to the court?

A. Yes, sir, I will be glad to point it out to the court. If your honor pleases, this is a little chart that I made for my own convenience, and here is Hereford, and here is Amarillo, and here is Abernathy. Now, this is an extract—

Q. You are referring now to Exhibit 2?

A. Exhibit 2 shows an extract of the A. T. & S. F.—Santa Fe System Distance Table No. 9900, and that shows the distance from Amarillo to Canyon City as 18 miles. Here is Amarillo and here is Canyon City. Now, from Canyon City to Hereford—here is Hereford—is 29 miles, making a through distance of 47 miles. Now, the rates on cattle from and to those points are carried in the Santa Fe System Tariff No. 6016-E; and this tariff is on file with the Interstate Commerce Commission under I. C. C. No. 5820; and that provides for distances of 50 miles, on cattle in carload, 12 cents per hundred pounds.

Court: This is less than 50 miles?

A. Yes; and so it says, "When exact distance is not shown, use next greater." We used 50 miles, although the actual distance is 47. Now, for 47 miles, or 50 miles as shown here, the rate is 12 cents, on cattle in cars. It says on cars 36 ft. 6

inches and over 34 feet; and the minimum is 22,000 pounds, which at 12 cents a hundred makes the \$26.40 from Hereford to Amarillo. Now, the same formula would be gone through from Abernathy, only the distance is 105 miles from Abernathy to Amarillo, and we use the 18-cent rate, because for distance of 110 miles, you see; it says, "Where exact distance is not shown, use the next greater," and we have used the next greater, 110 miles; the rate of 18 cents is used, which produces the \$39.60.

Court: You haven't got the mileage marked on here.

A. Yes, sir. Excuse me—105 miles. That is the tariff, and the only tariff they have providing a rate between those two points. And this is an extract of it.

Q. Now, just a minute. This is your conclusion, that these extracts are the only tariffs applicable to that Hereford-Amarillo proposition?

A. Yes.

Q. You haven't got the full tariffs here? You merely have sheets from the tariffs—extracts from the tariffs?

A. Well, this is the extract furnished by the Interstate Commerce Commission of the tariff applying between those points.

Q. Well, who is going to determine whether or not that is the one that is applicable—you or the

commission? The commission's certificate is simply that this is a true copy of that extract, isn't it?

A. Yes. But that is the tariff that authorized the rate between those points, and the only tariff they had at that time.

Q. That is your testimony to that effect, I understand, yes. But I don't want you to convey the impression to the court that the commission says that that is the rate from Amarillo.

A. Well, the commission certifies that.

Q. Certifies that that is a true and correct copy.

Court: How did they come to certify that? By inquiry from some one in order to get the tariff rates, or the basis for the tariff rates?

A. Did you write? I presume this was furnished on the request of the Oregon Short Line, your honor.

Mr. Hart: The point is, your honor, we don't ordinarily prove a rate by getting what some rate clerk conceives to be the item applicable—getting a certified copy of that. We should have a certified copy of the tariff.

Court: Have you got that?

Mr. Hart: No, I have not, as to that local rate.

A. I see the point Mr. Hart is making.

Mr. Robbins: Pardon me just a moment. Maybe I can answer your question right here. Well, go

ahead, we will find out—we will show you why they certified to that.

Mr. Hart: Let me place before your honor while I am questioning Mr. French a copy of this general live stock tariff. I don't mean the one quoting the local rate from Hereford to Amarillo—I mean the tariff quoting the live stock rates from Texas points to Idaho and Montana points.

Court: This is the through rate?

Mr. Hart: Yes; and that is a copy of this tariff which is Plaintiff's Exhibit 1.

Court: There is no question as to the through rate?

Mr. Hart: The question is whether or not the through rate from Amarillo was not also applicable from Hereford.

Court: Oh, yes.

Mr. Hart: And, of course, that is to be determined by a construction of this through rate tariff.

Q. Mr. French, the through rates from Amarillo and such points are shown in this Joint Live Stock Tariff No. 100-A, which is a part of this Plaintiff's Exhibit 1, are they not?

A. Yes.

Q. Now, this Joint Tariff 100-A is divided into three sections—section 1, section 2, and section 3,—is it not?



A. Correct.

Q. Section 1 undertakes to provide what is said to be the basis, from points of origin, for rates on range cattle and also horses? That is correct, is it not?

A. With certain differentials, yes.

Q. Yes. In other words, it names certain points which are said to be "base" points?

A. Yes.

Q. And from which through rates are applicable?

A. Yes.

Q. And then it lists stations in the vicinity of those base points, and gives the information about rates from those points, and as to whether or not the base point rates apply or differentials are applicable—that is, a greater or a less rate is applicable? That is correct?

A. Yes.

Q. So that in section 1 of this tariff we have a list of stations on all the Texas lines, or on most all of the Texas lines, and a stateemnt, or rather information, as to each one of those points, showing whether or not the through base-point rate is applicable, or, if not, how much of a differential over or under the base-point rate is applicable? That is true, is it not?

A. It is true when qualified by the application in the tariff.

Q. Yes, now, we get at that a little later. But I refer you, first of all, then, to page 26 of the tariff, that is, section 1 of the tariff. Under the heading "The Pecos & Northern Texas Ry. Co." on page 26 appears a list of stations among which is the station of Hereford, and the index number given is 98. That is correct, is it not?

A. Yes.

Q. And directly opposite, under the heading of "Rate Basis" is the word "Amarillo"? That is correct, is it not?

A. That is shown there on that table.

Q. So that, so far as the tariff makes it applicable, Hereford gets the same rate as Amarillo?

A. To certain points as qualified by the application and routings as in the tariff. Not to points on the Oregon Short Line.

Q. Just a minute. That is your contention, I understand.

A. Yes.

Q. But we will get this step by step.

A. Yes.

Q. Except as may be qualified by something which may later appear in the tariff, we have here on page 26 of the tariff, a statement that Hereford gets the same rate as Amarillo?

A. To certain roads, quite true.

Q. To certain roads—yes, that is true?

A. Quite true.

Q. Now, then, we turn over to page 50 of the tariff; and I refer you there to the middle paragraph, headed "Oregon Short Line R. R." But let me ask you first if this section 2 does not undertake to provide the rates in dollars and cents from the originating points—originating base points, we will say, in Texas to points in the Northwest?

A. It undertakes to provide through rates from Amarillo to points on the O. S. L.

Q. It undertakes also to provide through rates from El Paso and Deming, doesn't it?

A. Oh, to certain roads.

Q. From these base points to certain destinations?

A. Yes, as provided in the tariff.

Q. Now, then, I ask you to look at this middle paragraph on page 50 of section 2, and say whether or not this tariff does not show a rate of \$116.50 from what is called the "Amarillo Group" to Idaho Falls?

A. It does from the Amarillo Group to Idaho Falls, on cattle in lots of ten cars or more.

Q. Yes. And that is the basis of your statement to the court awhile ago that the through rate from Amarillo to Pocatello was \$116.50?

A. From Amarillo, yes.

Q. From Amarillo only, you said?

A. From Amarillo only.

Q. Now, this tariff section 2, this paragraph of it, quotes this rate from the Amarillo Group? That is true, isn't it?

A. Yes.

Q. And then we go back to section 1 of the tariff to find out what the Amarillo Group is, and we find, do we not, on page 26 of the tariff, the list of stations which are included in the Amarillo Group? That is true, isn't it?

A. To certain points on certain lines, Mr. Hart, but not for the O. S. L.

Q. We will get at this qualification a little later. I know how keenly you feel about it, but let us get at this step by step. We find on page 26, do we not, that list of stations comprising the Amarillo Group?

A. You do.

Q. In that list of stations we find the station of Hereford?

A. Hereford.

Q. So that, unless there is some limitation in this tariff which denies that rate, these two combinations, this section 1 and section 2, would put Hereford in the Amarillo Group, and give it the Amarillo rate? That is correct, is it not?

A. But I claim there is a restriction.

Q. I know what you claim, but please answer my question. Except for the limitation which you think there is in the tariff, we have here explicitly Hereford in the Amarillo Group?

A. Yes.

Q. All right. Now, let us hunt up this limitation.

Mr. Robbins: You may make any explanations you like of those answers, and qualify them as you go along.

Mr. Hart: I will try to be fair with Mr. French.

Q. Let us get at this limitation which you think prevents Hereford from being in the Amarillo Group. I refer you now to page 24 of the tariff. Page 24 gives an explanation of section 1 of the tariff, does it not?

A. Yes. It mentions there "Item 200—Governing use of differentials shown in Section No. 1, pages 24 to 31 inclusive."

Q. Let me read the first paragraph of that explanatory note to you. It says: "The differentials shown in Section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates as shown in Section No. 2 hereof, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69."

A. "Where application and routing is provided on pages 56 to 69."



Q. Yes. That is your point, then? That is the whole point in it, is it not? Your whole idea is, in using this Section No. 1, and in finding out that Amarillo includes Hereford in its group, we have got to take into consideration this explanation which says you use these differentials "where application and routing is provided on pages 56 to 69"?

A. Not only that, but there are other provisions in the tariff which are specific, and restrict the rates so that they do not apply to points on the O. S. L. from south of Amarillo.

Q. All right. Let us turn to page 56, if you please. Let us see what this limitation is which is to be taken into consideration in applying these differentials. Page 57 is a chart, which is called "Chart of Routes," is it not?

A. It is.

Q. Yes. And on the opposite page, page 56, there are certain explanations showing how that is to be understood?

A. Yes.

Q. And that explanation contains, under the heading "Note 1," Item 360, "Where Route Number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in Section No. 3." Now, then, you turn to your chart opposite, and you get the point at which the Oregon

Short Line column and the Pecos & Northern Texas column meet, and there is no route number?

A. Correct.

Mr. Hart: Does your honor see that?

A. Two little dots, right down the column of the O. S. L. and then across from the Pecos & Northern Texas.

Q. You get no number?

A. There is no routing there.

Q. So that, applying that explanation there, we have a situation in which there is no route number, and therefore no through rate, from the Pecos & Northern to the Oregon Short Line?

A. Correct.

Q. And that is your reason for saying that the Amarillo rate cannot be applied from Hereford?

A. From Hereford.

Q. All right. Now, then, we were referred to this section 3, to these pages 56 and 57, we were referred to those pages when we were at section 1 finding out how to apply this group basis, were we not?

A. Yes.

Q. And we had this explanation, that "The differentials shown in Section No. 1"—I am now reading from this explanation which precedes section 1—we were told that "The differentials shown in Section No. 1 are to be added to or deducted from

the Amarillo rate, to arrive at the through rate, where application and routing is provided on pages 56 to 69." So that if no through routing was provided on pages 56 to 69, then we could not apply these differentials? That is true, is it?

A. Well, the chart on page 69 shows—or what is the page, 56?

Q. 57.

A. The chart on page 57 shows a blank space from Pecos & Northern Texas Railroad points to points on the Oregon Short Line. Therefore there is no routing provided, and consequently the rates from points on the Pecos & Northern Texas Railroad would not apply to Pocatello, or Dillon, or Butte, or points on the O. S. L.

Q. Your reason for saying that is because section 1 here explains that these differentials which are allowed above or under the basing rates, above or under the Amarillo rates, can only be applied when you have got a route number—when you have got a through route? That is the point, is it?

A. Yes, there are quite as many blank spaces on that page 57, Mr. Hart, as there are routings shown.

Q. All right. We understand that. I just want to make sure that that is the basis of it all.

A. Yes.

Mr. Hart: Section 1, as your honor knows, states these base points—states what stations take the same rate, what stations have differentials.

Q. And then we come to this explanation of section 1, which says the differentials shown in section 1 are to be added to or deducted from the Amarillo rate so as to arrive at the through rate, where there is an application and routing shown on page 57 of the tariff?

A. Yes.

Q. Now, then, having settled that, let us get to the following paragraph of this explanation of section 1, and I refer you to that, page 24, and I read this: "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated." Now, do you find any reference whatsoever in that paragraph to pages 56-69 of the tariff and the routing application?

A. That paragraph refers to rates to points where rates are authorized. You referred to Piedmont a short time ago, Montana, on the C. M. & St. P. The rate would apply by Council Bluffs, where the C. M. & St. P. would get their haul to Piedmont, get the long haul, that rate would apply via that route. But apply that rate by the Colorado Southern, and the Fort Worth & Denver City, and the Pecos & Northern Texas up to Granger, plus our rate to Dillon, and then the rate to Butte, and then through the other way, the Milwaukee are entitled to their local from Butte to Piedmont. That clause one applies, Mr. Hart, on shipments as authorized

to destinations on different lines, as authorized by the tariff. But under the application on page 56, if I am not mistaken, of the tariff, you will find—let me read that please. Page 56. You will find a clause here in Item 360: “Rates provided herein from points of origin shown in Section No. 1 to points of destination shown in Section No. 2, will apply only via the routes indicated in chart on page 57, except as provided in Item 350. Note 1.—Where route number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in Section No. 3.” Section 3 is miscellaneous rates. Then it says: “Note 2.—The insertion of a route number is not to be construed as indicating that rates named will apply from all points on the originating line to all points on the destination line via any or all intermediate lines. The data shown on pages 58 to 69 inclusive opposite the route number indicated specifically describes the points of origin, the routes and the points of destination.” Now, I would like to elaborate here a little.

Q. You haven't got the point of my question. I don't want to cut in on your explanation.

A. Excuse me a moment. I would like to illustrate. We have certain rates from interior points on our line—like Walla Walla and Pendleton, on Camas Prairie Railroad, which you know is oper-



ated by the O.-W. and Northern Pacific alternate years, as party to that tariff. The common point rates do not apply from certain points, like Grangeville, there are arbitraries or differentials, or there may be local rates provided for that point. The same way with Portland, for instance, to Eastern territory, the North Coast terminal rates will apply; whereas if the shipment originated at Estacada, for example, the local rate from Estacada into Portland would be added to the through rate to Kansas City, or New York, or New Orleans. Now, in this instance, there is no specific routing provided from Hereford or Abernathy; consequently we must use the local rate from those points to Amarillo, the basing point, plus the rate from Amarillo to these Oregon Short Line points, for the reason that there is no rating shown in this tariff to Oregon Short Line points; and if we concede, your honor, that this tariff authorizes through rates from Hereford and Abernathy to points on the Oregon Short Line, then that concession must void every blank space on this page, which is put there—the blank space is put there to illustrate the fact that the through rates do not apply from those points; and that is the only difference between the numbered spaces, where the routings do apply, and the blank spaces, where the routings do not apply. Now, that is my construction of the tariff.

Q. Amarillo is on the Pecos & Northern Texas, is it not?

A. Amarillo is on the Pecos & Northern Texas.

Q. And there isn't any question but what there is a through rate and a through route from Amarillo to Pocatello?

A. Conceded.

Q. Yes, sir. So that we cannot read this quite literally, can we, this chart, where it says there are no through rates from Pecos & Northern points to Oregon Short Line points?

A. This Amarillo happens to be the basing point there. El Paso or Deming might be the basing point from some other territory. But you cannot, Mr. Hart, read into that tariff an application that is not there; and I do not consider that there is a routing authorized in that tariff.

Q. Supposing there is not, we have a through routing authorized from Amarillo, on the Pecos & Northern, to Pocatello, in Idaho, on the Oregon Short Line?

A. Admitted.

Yes. Now, then, the sole question is, have the makers of this tariff undertaken to extend that Amarillo rate to Hereford and absorb it in any way they choose in their division?

A. There is, as you said, a through rate from Amarillo to Pocatello. There is not a through rate

from Hereford or Abernathy, nor is there any authority for it in the tariff, because the routings are not specified from Abernathy or Hereford. I admit there is a through rate from Amarillo to Pocatello. I quoted it—\$116.50.

Q. Let us get back, if you please, where you were when you started this explanation. Take this section 1 again, on page 24 of the tariff, which explains how these groupings are to be taken, and how the rates applicable from grouping are to be applied, and we have this explanation which says, so far as differentials are concerned, differentials over or under the Amarillo rate, they are to be added or deducted to make the through rate, where application and routing is shown on page 57, etc.

A. Yes.

Q. And you say, then, that in order to use those differentials you have got to go back and see whether there is a routing?

A. Precisely. But you are—

Q. Yes. Now, just a moment. The next paragraph deals with cases where there are no differentials shown?

A. Yes, sir.

Q. Now, as to Amarillo and Hereford there is no differential, according to this grouping, Hereford takes the same rate as Amarillo?

A. Not to points on the O. S. L., Mr. Hart.

Q. Well, you are going back to the end of the tariff again. I ask you if, in section 2 of this tariff, Hereford is not shown to be in the Amarillo group?

A. Excuse me a moment. You are using the description there referring to group one of the tariff. You are not using the application of rates, which is authorized only in one place in the tariff, and that is page 56.

Q. I am trying to do what the shipper would do if he was endeavoring to get at the correct rate.

A. Precisely.

Q. Now, this explanation of the groupings has two clauses. The first refers to instances where there are differentials—in other words, to cases where there is a small addition to or deduction from the Amarillo rate?

A. Correct.

Q. That is the first paragraph; and it says you can use those differentials only when you have a routing and application as shown in the end of the tariff?

A. Yes, sir.

Q. In other words, you are given a specific reference to go to the tariff and find out whether you have got your through routing and application?

A. Yes.

Q. Now, then, you come next to the case we are interested in here?

A. Yes.

Q. That is, where there are no differentials shown. In other words, where the Amarillo rate is said to be the same as the Hereford, and where these lists of stations comprising the Amarillo group take the same rate as Amarillo, so far as section 2 is concerned. Now, look to your explanation to find out how you are going to apply that situation, where there are no differentials, and the explanation is that "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated."

A. "As indicated."

Q. Now, will you tell the court—

A. Excuse me, Mr. Hart—"as indicated."

Q. Will you tell the court why it is necessary for any one to go one step farther when he has secured that information—he has gone to the index and been referred to section 1, to find that Hereford is grouped with Amarillo; then he has gone to section 2, to find that the Amarillo rate is \$116.50; and then this explanation that where no differentials are shown the Amarillo rate is to be applied—no reference to the routing at the end of the tariff?

A. Well, if it pleases your honor, I have admitted that there are through rates from Amarillo to Pocatello, which is the Idaho rate, from Amarillo to certain other points on the Oregon Short,



Line; but those differentials, or the through rates, as authorized, based on the Amarillo rate, from Hereford or from Amarillo, apply to C. B. & Q. station—to C. M. & St. P. stations—to Colorado & Southern stations—to Denver & Rio Grande stations; consequently they say “as indicated;” and under the application, your honor, on page 56, they say that the rates will apply under the routings as authorized by the application; and then on page 57 on your chart they indicate as plainly as they can—they cannot show all the stations on the Oregon Short Line—they indicate as plainly as they can by dots or blank spaces that there is no through routing, consequently no through rates, from Abernathy or Hereford, or any point, in fact, south of Amarillo. I am only admitting there are through rates from Amarillo to points on the Oregon Short Line. Under that tariff, there are no through rates from points south of there to points on the Oregon Short Line.

Q. Well, then, Mr. French, do I understand you to say that the words “as indicated” at the end of that sentence are to take the place of the last clause of the preceding sentence? In other words, they are intended to refer you to page 56 and following of the tariff for routing?

A. You have only taken the description there as to your first section of your tariff, Mr. Hart.

Q. Yes, but you said a moment ago—

A. Excuse me a moment.

Q. All right.

A. You must consider that the second section of the tariff names the rates from Amarillo to points on the Oregon Short Line.

Q. Yes.

A. I have not admitted that rates are provided from points south of Amarillo. Now, then, having those through rates from Amarillo, you only have them where the routing is shown by numerals on the chart on page 57; but you haven't got them from other points, because under your application, which is the key to the instructions in the tariff, which is the same as our application under our transcontinental tariff—we have rates to North Coast terminals—we have rates to Oregon points and to Spokane points—you couldn't use the North Coast rates to all of the interior.

Q. If it is not necessary, then, for us to be given a reference to any routing or application when we look up these rates—

A. Certainly, sir, that is the first thing you refer to in a tariff.

Q. Wait a minute. (Continuing), why is it necessary, when we are speaking of differentials, taking a station which is near Amarillo, and this tariff, section 1, shows a differential of \$5.00 less. Now, we look at the application—we want to know

whether we are going to get that differential, or whether we will have to pay the local rate to Amarillo. We look at this explanation preceding section 1, and we see it says this differential we can only obtain where there is application and routing provided on pages 56 to 69?

A. Yes.

Q. So we know that, when we have this differential of \$5.00 less, we can only use it and avoid the local rate when there is this application and routing?

A. Yes, sir.

Q. Now, then, we come to the next station which is shown to be in the Amarillo group, without any differential, and we look again to this explanation to see whether we are going to be able to get that Amarillo rate, and we don't find any reference in that explanation to any routing or application. We find merely the statement that "Where no differentials are shown, the Amarillo rate as shown in section 2 is to be applied as indicated?"

A. *As indicated.* Certain lines are agreeable to the application of the Amarillo rate to points on their line. The Milwaukee and the Burlington and other lines. The Oregon Short Line is not.

Q. So the words "as indicated" are what you think will give you the reference?

A. I do, because in that particular section of

the tariff—now, you are not taking the other portion of the tariff, which is on page 56—the application of the tariff is the key to the situation, and that specifically states, Mr. Hart, page 56, that the rates will not apply except where the routings are specified in the chart on page 57. You find a blank space on page 57.

Q. Now, Mr. French, we will suppose these tariffs, of course, are open to shippers and railroads alike, and the shippers are charged with knowledge of them?

A. Yes.

Q. So that, theoretically at least, they are supposed to be explainable—supposed to be readable by the shipper who comes to get a rate?

A. Yes.

Q. Now, the shipper comes in this instance to find the rate from Hereford to Pocatello, and he goes to the index to find Hereford first, and he looks in the index of points of origin, and he finds on page 5 of the tariff Hereford, Texas, P. & N. T. Ry., and he is referred to item 98 of the tariff. Then we look up this item 98, and we find Hereford listed under the heading, "Pecos & Northern Texas Railway Company," and giving it the rate basis of Amarillo. Now, that is what the shipper does. He finds first of all, by reference to the index, that from Hereford on the Pecos & Northern Texas Railway—or that is, that Hereford is in the



so-called Amarillo group. Now, then, he goes to Amarillo. He looks up and finds out what the rate is from Amarillo, and he goes to the index to look up Amarillo, and he finds the reference then to Amarillo, and he looks for his destination. He wants the rate from Amarillo to Pocatello or Idaho Falls, and he finds in section 2 these rates from Amarillo to Idaho Falls, and on page 50 of the tariff he finds Oregon Short Line points and the rates from Amarillo, and he finds the \$116.50 rate from Amarillo to Idaho Falls. Now, then, why should a shipper go farther in his effort to learn the rate, when he goes to that index and he finds Hereford listed as Item 98, and he goes to Item 98 and he finds that Hereford is included with Amarillo, and he goes to the index and finds that Amarillo is listed as giving a rate to Short Line points of \$116.50? Isn't that the end of it?

A. Well, I am not going to criticise the law, but the law, as you know, charges the shipper with the knowledge of the rates. Now, if he doesn't find those rates, want of knowledge on his part is no excuse.

Q. That is all?

A. And my interpretation of this tariff, after numerous years of experience, which is made condensed under the rules of the Interstate Commerce Commission, would not permit the application of that tariff as you wish it to be applied.



Court: Has the Interstate Commerce Commission ever construed that tariff? I mean, that tariff with the conditions imposed by those notes?

A. They have never criticised it, sir, to my knowledge. It was filed by Mr. Poteet as agent, and, as far as I know, it was accepted by the commission. We have attempted on some occasions to make a paragraph explain the application of a tariff, where wharfage and other terminal charges are involved, from numerous points all over the country, and frequently our tariffs have been returned for more detail or more definite information before the commission would accept them. Now, this tariff was published and filed with the commission in 1912, and of course I don't know—I didn't publish the tariff; whether Mr. Poteet ever received any criticism from the commission, I don't know. But I do know that, when we have to publish tariffs under certain prescribed forms, with a certain number of pages and index, and all the rest of it, we are often put to it to try and get it in as condensed form as possible, making it as explicit as possible, and yet as concise as possible; and that tariff, to my knowledge, has never been criticised. It may be.

Mr. Hart: Of course, that is not of importance anyway, whether it has or has not. This witness has nothing to do with its application or with its filing.

A. I don't think, though, that any experienced railroad man would pick up that tariff, in view of the blank space on page 57, routing, and construe it to apply.

Mr. Hart: That is argumentative.

Court: The thing I was trying to get at was whether or not this tariff has ever been brought before the Interstate Commerce Commission for the purpose of determining how to construe it.

Mr. Hart: Oh, I don't think so, your honor.

A. Oh, I don't think so.

Mr. Hart: As I said in my opening, the carriers themselves construed it our way for several years, because they collected the lower rate—\$116.50—did apply it from Hereford, and checked and rechecked it. It was only after a number of years had elapsed, and after these various checkings, that some one made this discovery which Mr. French has testified to. So that it is our claim that, as a practical matter, the practical construction given it by the railroads for years shows the application of this Amarillo rate to Hereford.

Court. Well, the application is very clear if there is no reference made to those notations that are made on page 56.

A. Page 57 on the chart.

Court: Yes, 56 and 57, the application of the rates. No. 350 and No. 360. If it were not for

those notes there, the application would seem to be very clear.

A. Yes. But, if your honor please, that is the only place—there is always a place in the tariff for the application, because there are so many rates, and so many roads parties to the tariff, that rates will apply to one line where they will not to another. Consequently a tariff cannot be taken on its face. It must be qualified with instructions or application. And under that application in the tariff, which is the first thing an experienced rate man looks at, you get a qualification of the rates there.

Mr. Hart: These tariffs are not to be made up by rate experts, I want your honor to understand. They are intended to be made up for the benefit of the shipper, and the Commission has repeatedly said they must be clear, they must not be ambiguous, and if there is any ambiguity it is to be construed in favor of the shipper. But I don't want to get into an argument of the case now, and that is what we have really been doing. I want to reserve that till later. That is all my questions with Mr. French.

#### Redirect Examination.

Q. Mr. French, did I understand you to say there were through rates named in this tariff from Amarillo in connection with the P. & N. T.?

A. There is a through rate, Mr. Robbins, named from Amarillo to points on the O. S. L., yes.

Q. In connection with the P. & N. T.?

A. In connection with the P. & N. T., yes, sir. Well, Amarillo was on the Pecos & Northern Texas.

Q. It is also on the Fort Worth & Denver City, isn't it?

A. Yes; but the question asked was, was there a through rate from Amarillo to points on our line? Well, Amarillo is on the Pecos & Northern Texas Railroad just as much as it is on the Fort Worth & Denver City, and there is a through rate there under the tariff. There is nothing to that point.

Q. Well, I am asking you, if you are testifying there is a through rate from Amarillo in connection with P. & N. T. business?

A. There is a through rate from Amarillo. At the time these shipments moved the through rate from Amarillo, which was a point on the Pecos & Northern Texas, was \$116.50, for example, to Pocatello. That plus the rate from Hereford or Abernathy to Amarillo made the through rate.

Q. Now, I am asking you if those through rates do not apply to Amarillo in connection with the Fort Worth & Denver City?

A. Yes, they apply in connection with Fort Worth & Denver City, the Colorado & Southern, and the Union Pacific, and the Oregon Short Line.

Court: Fort Worth & Denver City doesn't show a blank?

A. Well, that is the line north from Amarillo, your honor, which has since been—the old name of that line was—here is the Pecos & Northern Texas up here to Amarillo—then this was the Southern Kansas Railway of Texas at one time, but it has since been amalgamated into the Panhandle of Texas, the Santa Fe & Panhandle of Texas, because, I believe, the local laws of Texas require local names of railroads, or something to that effect. While the Fort Worth & Denver City is now, I think, the old Kansas, or Southern Railway of Kansas. I think that is the situation, but I am not exactly clear on that. But I don't quite know the point that counsel wished to make. Would you like this, judge? It shows, possibly, a little bit of the situation.

Court: Do you want this marked?

Mr. Robbins: No, I am not particular about marking that.

Court: It may be marked.

Mr. Robbins: If your honor wants it, we will offer it.

Court: Yes, well, let it be offered.

Marked "Plaintiff's Exhibit 3."

Excused.



Mr. Hart: I would like to put Mr. Lothrop on tonight, if I could.

Mr. Robbins: I couldn't very well assent to that, your honor.

Court: Very well, if you object to it, we will adjourn until tomorrow morning.

Adjourned until 10 A. M.

Portland, Oregon, April 17, 1917.

George F. Anderson, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Robbins:

Q. Your name is George F. Anderson?

A. Yes, sir.

Q. What is your business?

A. Traffic manager of the Union Meat Company, North Portland.

Q. Have you any connection with either one of the defendants in this case?

A. Why, I have in a way looked after the checking of their freight bills and freight matters.

Q. You act as traffic manager?

A. For both concerns.

Q. For both concerns?

A. Yes.

Q. You were so acting in 1912?

A. Yes, sir.

Q. Now, I will ask you if in 1912 you had any transactions in connection with these shipments which are in controversy here with the Short Line?

A. Not in 1912.

Q. Well, subsequent to that?

A. Subsequent to that time, yes.

Q. And what is the fact as to whether or not you filed a claim there for a refund on one of these shipments on the Loan case?

A. Involving the local rate from Idaho Falls down to Pocatello?

Q. Well, you did file a claim?

A. Of \$20 a car.

Q. You filed a claim in the Loan case?

A. Yes.

Q. How much was that claim you filed?

A. Well, there were two claims.

Q. Well, take one at a time—take the first one of January 30, 1915.

A. That involved 17 cars, was \$340, and we figured the interest for two years four months at six per cent, \$47.70, making a total of \$387.70.

Q. Now, have you got your reference there, your claim number?

A. Yes.

Q. Is that the Short Line's 8274-13-9?

A. Yes, sir.

Q. And that \$387.70, then, covered \$47.70 interest?

A. Yes, sir.

Q. Now, then, the other claim you speak of, is that carried under Short Line 8274-31-9?

A. Yes, sir.

Court: What is the date of that claim?

A. The date on the first one is January 30, 1915, and the second claim is February 5, 1915. That was approximately two years and a half after the shipment had moved.

Q. And how much was the amount of that, Mr. Anderson?

A. The amount of claim as presented was \$200 involving an overcharge on 10 cars, and with interest for two years four months at six per cent, \$28—total \$228.

Q. Now, you presented these claims on behalf of the Loan Co.?

A. Yes, sir.

Q. Acting as their agent?

A. Acting as their agent.

Q. You held a written assignment from them, I presume?

A. I did.

Q. Now, those claims were paid to you as agent for the Loan Company, were they?

A. Yes, sir.

Q. The document which you are referring to now is what?

A. That is O. S. L. voucher, payable in my favor as agent.

Q. And this covers the \$228 refund?

A. And this one is payable to me as agent, voucher O. S. L. for \$387.70.

Q. And those are the two refunds you have been describing?

A. Yes, sir.

Mr. Robbins: We offer these two vouchers in evidence, your honor.

Received without objection, and marked "Plaintiff's Ex. 4," and "Plaintiff's Ex. 5."

#### Cross Examination.

Questions by Mr. Hart:

Q. Mr. Anderson, your first connection with these transactions, you say, was several years after the shipments?

A. Yes.

Q. You were asked by the Portland Cattle Loan Company to check over its freight bills, and see whether or not any errors had occurred?

A. Yes, sir.

Q. And you were doing that generally with shipments for the Portland Cattle Loan Company?

A. Yes, sir.

Q. And when you came to these shipments from Hereford, Texas, to Idaho and Montana points, you examined the expense bills and the tariffs to see whether or not the charges were correct, did you?

A. Yes, sir.

Q. You had had some experience yourself in tariff matters, had you not?

A. Yes, I had been employed as rate clerk for the C. B. & Q. Railroad for six years. Subsequent to that time I was twelve years as traffic manager for Swift & Company at South St. Joseph and Fort Worth, Texas, and eight and one-half years with the Union Meat Company as traffic manager at North Portland, and had made a specialty of live stock rates and tariffs.

Q. Altogether you have had about 26 years in traffic work?

A. Altogether, yes.

Q. And for most of that time you have been dealing with railroad tariffs applicable to live stock shipments?

A. Particularly so with reference, when I came to Portland, to adjust the live stock rate situation here. I had to go over the situation with all the lines and adjust the rates to North Portland as



compared to other centers, such as Puget Sound, and other interior points.

Q. That is, you had charge of the general rate adjustment following upon the establishment of stock yards and plant?

A. And a revision of the tariff with the railroad.

Q. I mean, consequent upon the establishment of the industries out there at North Portland?

A. Yes.

Q. So that, at the present time, you have charge of all traffic matters for the Union Meat Company?

A. Yes, sir.

Q. And did at the time of these shipments?

A. Yes, sir.

Q. Were you dealing daily with tariffs then?

A. Yes, sir.

Q. Now, in going over these freight and expense bills for the Cattle Loan Company, did you have occasion to examine the tariffs applicable to the shipments?

A. Of these particular shipments?

Q. Yes.

A. I did.

Mr. Robbins: Well, now, if the court please, we have no objection to counsel going into that, but we want it understood he is making this wit-

ness his own. We didn't ask him anything about the application of the tariffs on direct examination. We asked him about these payments.

Mr. Hart: Well, ultimately, I shall make Mr. Anderson my witness, no doubt; but thus far I am dealing strictly with matters which appear to be brought out on the direct examination; that is, these refunds. The direct examination went to the refunds, and I propose to find out all of the circumstances surrounding the making of the claim for refunds.

Court: Did you go into these rates for the refund?

A. I did, your honor.

Q. I show you Plaintiff's Exhibit 1, Mr. Anderson, which states that it is "Joint Live Stock Tariff No. 100-A," and ask you if you examined that tariff in connection with these proposed refund claims of the Cattle Loan Company?

A. I did. I had a copy of this particular tariff in my possession at the time.

Q. And then, as a result of your examination of that tariff, what did you conclude as to the rates which were applicable?

A. The rates according to this tariff, as being applicable from Hereford, Texas, to Pocatello—the rates according to the tariff, as I read them, were applicable from Hereford, Texas, to Idaho Falls at the rate of \$116.50 per car.

Q. That is, you concluded that the Amarillo rate was clearly applicable from Hereford?

A. Absolutely.

Q. Now, then, what criticism did you have about the rates which had been charged the Cattle Loan Company for that shipment?

Mr. Robbins: Well, now, we renew our objection. We did not go into the accuracy of these rates with this witness at all. We merely asked him on direct if he got these refunds and he said he did.

Court: Counsel is trying to get at how he reckons his refunds—how the witness estimated his refunds. Of course, he had to have the tariff rate before him.

Mr. Robbins: I have no objection to his going into that if he makes him his own witness and lets me cross-examine him.

Court: If he is going to examine him as an expert, he probably will.

Mr. Hart: No, your honor, I may do that later, but I am still getting at the basis of this refund, because I do not want any impression created that Mr. Anderson in making these claims criticised any part of the rate except the Idaho Falls-Pocatello proposition.

Court: Very well, the court will hear you. I will overrule the objection.

Q. The question was, what criticism you did find with reference to the rates exacted?

A. Well, if it pleases the court, I will read a communication that I addressed to the freight claim agent of the Oregon Short Line in connection with the first claim.

Q. Well, perhaps counsel would not permit that. You can just tell what you did. What did you find with reference to the tariff?

A. I found that there was an overcharge of \$20 per car in the rate between Idaho Falls and Pocatello. In other words, the railroad had assessed the \$116.50 per car rate to Idaho Falls and assessed the local back from Idaho Falls to Pocatello; while, as a matter of fact, the intermediate application of the tariff provided that the Hereford-Pocatello rate should not exceed the Hereford-Idaho Falls rate.

Q. I see. Idaho Falls is a little—is farther west?

A. To the north.

Q. Farther to the north than Pocatello?

A. It is on the main line of the Salt Lake-Butte line of the O. S. L.

Q. So that, under the intermediate application on the long and short haul clause, they could not charge more for Pocatello than they did for Idaho Falls?

A. No, not according to the application of this tariff, although their freight claim agent contended that they could. I personally addressed a communication to the general freight agent, who has charge of the issuing of all the tariffs, and after addressing him personally on the subject, he sustained our position.

Q. Oh, I see—the freight claim agent first insisted that the \$20 charge for Idaho Falls-Pocatello was proper?

A. Absolutely.

Q. And then the general freight agent personally overruled him?

A. Overruled him; because the general freight agent is the one who construes or reads the tariffs as they are supposed to be read.

Q. So that then the allowance of this refund was made to you?

A. Yes, sir.

Q. And by what department was it paid?

A. I didn't understand the question.

Q. Was it paid by the auditor of the Short Line?

A. By the freight claim agent. He then received instructions from Mr. Reeves to voucher the two claims.

Q. Mr. Reeves is the general freight agent?

A. Mr. Reeves is the general freight agent of the Oregon Short Line.



Q. So that since that time, since 1915, has there ever been any suggestion that that refund was not entirely proper?

A. Until the application was made to their auditor.

Q. Well, this present application, and this law suit which grew out of it, did not criticise the Idaho Falls-Pocatello position that you had taken, did it?

A. No, not a bit.

Q. This case and the claims on which it rests deal with the Hereford-Amarillo situation?

A. Entirely. This claim here, it is not considered it enters into it at all.

Q. In other words, every one is agreed that the tariffs permit the same rate to Pocatello as to Idaho Falls?

A. Yes.

Court: That is to say, you didn't look into that matter—you took that for granted as being the rate from Hereford to Pocatello?

A. No, I figured, your honor, that the rate from Hereford, Texas, according to the tariff to Pocatello and Idaho Falls is the same—\$116.50; but the Short Line had assessed \$116.50 to Idaho Falls and charged us the local back to Pocatello.

Court: Well, now, the only question that arose

on the refund, was whether or not they had a right to charge the rate back?

A. Yes, that was what entered into this claim.

Court: That amounted to \$20?

A. Yes, sir.

Court: That is what you looked into especially?

A. Well, I looked into both the revising of the bill and the overcharge that had been made at the same time.

Q. That is, you checked up the whole rate?

A. Yes.

Q. At both ends of the trip?

A. Yes.

Q. And you satisfied yourself that according to that tariff Hereford shipments took the same rate as Amarillo shipments?

A. Yes, being in the Amarillo group, and according to the application.

#### Redirect Examination.

Q. Now, as a matter of fact, Mr. Anderson, the whole controversy in this case, with you and the freight claim agent and everybody else, was whether or not the rate applied from Hereford to Idaho Falls, wasn't it?

A. No, as I say, Mr. Robbins, we were checking our expense bills to the ultimate destination of the live stock; and according to the tariff I found that

the \$116.50 rate applied from Hereford in the Amarillo group to Pocatello and to Idaho Falls therefore I discovered there was an overcharge of \$20 per car, and I addressed a letter to Mr. McNitt of the Short Line, calling his attention to the mistake that had been made in assessing the local back from Idaho Falls to Pocatello; and his reply was that there was no through rate published to Pocatello.

Q. From where?

A. From Hereford to Pocatello. We are saying from Hereford to Pocatello.

Mr. Hart: Or from Amarillo to Pocatello?

A. Or from Amarillo to Pocatello.

Mr. Hart: The point was whether Pocatello or Idaho Falls was the destination.

Q. So we went back at Mr. McNitt and referred him to the application of the tariff, and still he didn't concur with reference to the local rate of \$20. Then I addressed a communication to the general freight agent under personal cover—Mr. J. A. Reeves—and he came back and sustained our position that the through rate from Hereford, Texas, to either Pocatello or Idaho Falls was \$116.50.

Q. You just point out in the tariff where you get the through rate of \$116.50 from Hereford, will you, please?

A. By referring to page 26, section 1, we find under index 98 the town of Hereford at the Ama-

rillo basis charge. The Amarillo basis I think was described yesterday. To make it a little more clear now, you take such points as St. Louis common points and Missouri River common points embrace a lot of common points in a certain territory.

Mr. Hart: By common points what do you mean—points that take the same rate?

A. Points that take the same rate. We will say St. Louis common point rate from Quincy, rate from Davenport, Moline, East St. Louis, are all in that group, although they are a considerable distance apart, from the basing point they take the same rate. Consequently, according to this tariff Hereford is subject to the Amarillo rate. Then by referring to page 50 of section 2, item 2050, we find the rate in lots of 10 or more cars—both of these shipments consisted of lots of ten or more cars—\$116.50 per car.

Mr. Hart: From and to where?

A. From Hereford, in the Amarillo group, to Idaho Falls, Idaho.

Q. Now, that is the basis of your computation, is it?

A. That is the basis of the rate.

Q. And that is the reason you say the rate applies from Hereford to Idaho Falls?

A. Yes.

Q. Well, now, in reading a tariff, it is usual to

read the whole of the tariff, isn't it, and not just pick out one or two parts of it?

A. Well, you will find your application right there, as you open up to this index here.

Q. Well, now, what does that application say as to section 1? Doesn't it say here that "The differentials shown in Section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates as shown in Section No. 2 hereof, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69?"

A. That is with reference to where there is a differential. There is no differential to be added or to be deducted from that rate.

Q. Well, now, wait a moment. That means this statement here that you are reading on page 25 can only apply where the routing over here on page 56 and the application makes it so, doesn't it?

A. Where there is a differential.

Q. All right. What does the next one say, then? The next one says that, where there is no differential, "the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated," in section 2.

A. There is no foot-note or any clause in there that gives any reference to your application on the back of the tariff at all. So naturally—



Q. What does this mean here?

Mr. Hart: Let him finish.

A. Wait till I get through. General Freight Agent Reeves and all the rest of the Short Line officials have passed upon it the same way.

Q. I am asking you what you think about it now; not what Reeves thinks about it.

A. Well, I have already stated what I think about it.

Q. Well, Mr. Anderson, this note, then, section 1, Item 200, on page 24, in your opinion, now, does that mean anything at all?

A. It means where there is a differential to be added or deducted.

Court: What is meant by a differential?

A. Well, in parts of that tariff—let me have that tariff so I can explain it to the judge a little farther. Here, your honor, these added differentials are to be added to the rates to apply through—like from Texico, New Mexico, would add \$2.75 over the Amarillo rate. Here are some that are to be deducted from the El Paso and Deming rate. Now, we turn to this one here, where Hereford is, you see there is no differential at all. Now, here is one above there, from Angeles, Texas, we add \$25 to the Amarillo rate.

Q. Well, now, you say you find no differential in the Hereford rate. Now, what does this second

note here mean, then? It says, "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated." What do you say that means?

A. Well, that means just what it says, where section 2 names the rates.

Q. Well, I presumed it did, but I thought you could explain it probably; you are qualifying as a rate man.

Mr. Hart: Are you cross-examining him now as my witness?

Mr. Robbins: I am trying to cover some of the grounds that you covered—whatever you call that.

Mr. Hart: Well, then, when you are through I will just keep him on and ask him all the questions I have to ask him.

Mr. Robbins: Have you an objection in here?

Mr. Hart: I think I will make no objection. Go right ahead, Mr. Robbins.

Q. By referring to section 2, Mr. Anderson, doesn't that show that the rates shown in No. 2, in columns headed Amarillo and El Paso, are to be applied from stations shown in section No. 1 where application and routing is provided on page 56?

A. That refers to where the differential is added or deducted.

Q. Yes. Now, can you point out on page 56

where there is any application or routing from any points on the P. & N. T.? Can you show that?

A. Does it make any specific reference in the note here as to the application? Here is your application.

Q. Will you answer my question, please, and then I will take the stand if you like?

A. Well, I am taking the tariff as it reads.

Q. I am asking you if you can point out any application or routing on page 57 from P. & N. T. points to O. S. L. points?

A. Here is your application and the rates. You are referring to something back that refers to some foreign line matters.

Q. Will you answer my question, if you please, Mr. Anderson?

A. I think I fully answered your question.

Q. Can you point out on page 57 any application or routing from P. & N. T. points to O. S. L. points?

A. I have answered your question. This paragraph here, 2, governs.

Q. Paragraph 2, "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in section No. 2 are to be applied as indicated." Now, just show us what section 2 is indicated from?

A. Section 2 is right here, page 50.

Q. That shows the Idaho Falls rate of \$116.50?

A. Yes.

Q. Well, now, turning back to page 32, doesn't item 205 say that those rates can only be applied where the application and routing is provided on pages 56 to 69?

A. That has reference to the differential basis.  
Mr. Robbins: That is all.

Examination by Mr. Hart.

Q. Mr. Anderson, it was 1915—January, 1915, when you discovered this overcharge by reason of the Pocatello-Idaho Falls local?

A. Yes, sir.

Q. And how long afterwards was it that you got the refund, just approximately?

A. Well, it was probably sixty days after that time.

Q. Sixty days afterwards. And you said in your examination a moment ago—

Mr. Robbins: Pardon me. This is the date here.

Mr. Hart: He said approximately. These vouchers show January 30, 1915, and February 17, 1915. Those would be the correct dates?

A. Yes, those would be the correct dates.

Q. Now, when Mr. Reeves answered you and told you that he had instructed Mr. McNitt, the freight claim agent, to allow you a refund, did he say that he agreed with your statement of the rates?

Mr. Robbins: Well, if the court please, I don't think that is very material what Mr. Reeves said about it. The question is, what is the tariff rate here?

Mr. Hart: It is very material to show that it is a fact that the general freight agent of the Oregon Short Line Company construed this tariff as the defendants and Mr. Anderson construed it, to-wit, as applying the \$116.50 Amarillo rate from Hereford.

Court: That would be hearsay, wouldn't it, so far as Mr. McNitt is concerned?

Mr. Hart: Well, I am asking him what Mr. Reeves said to him, the general freight agent of the Oregon Short Line, the plaintiff company.

Court: Said to the witness?

Mr. Hart: Yes, said to the witness by letter or statement.

Mr. Robbins: I don't see how that would be material. You might get a dozen men that would say the rate was \$116, or \$110. I don't see that that would make any difference,—to permit this man to testify to purely hearsay.

Mr. Hart: It seems to me we have a right to show what practical construction the carriers have placed on this tariff. It appears already in evidence that for two and a half years the tariff was apparently construed as we claim it should be con-



strued, and that a refund was paid which recognized that construction; and that is the only point to this question.

Court: I think that is generally admitted, isn't it?

Mr. Robbins: We admit we made a mistake, yes. We admit we made a mistake in reading the tariff.

Mr. Hart: The point is they didn't make any mistake so far as Hereford and Amarillo were concerned. We want to show their construction of it.

Court: That is the very gist of the controversy, as to whether they did make a mistake or not.

Mr. Hart: Yes, and of course it is material to know how those men viewed the tariffs—the men who built the tariffs and who are responsible for their construction.

Court: I understand that it is admitted here that for those two years and a half they did construe the tariff as you say it ought to be construed now.

Mr. Hart: Yes.

Court: And after that they discovered their error. The question is whether or not they were in error, or whether or not they were construing it properly.

Mr. Hart: Yes. Well, I will withdraw that

question and put it in another form that perhaps will not be objectionable.

Q. Mr. Reeves did direct a refund, which refund of necessity recognized the application of the Amarillo rate from Hereford, did he not?

A. Of \$116.50 from Hereford to Pocatello.

Q. Yes. Now, then, when did the Cattle Loan Company first know that there was any claim that the Hereford rate—that it was necessary to collect the local rate from Hereford to Amarillo?

A. Well, to begin with, the Short Line instead of presenting expense bills, their treasurer drew a draft on the Portland Cattle Loan Company for \$7,693.25, involving the charges on all the shipments represented here in this case. They simply attached a memorandum. There was no expense bill submitted. About two years after, the Portland Cattle Loan Company obtained copies of these expense bills from the railroad; and it was then about three months after that that the claims involving these overcharges were presented.

Q. What I was getting at was, whether or not, during the time you were corresponding about the Idaho overcharge, there was any statement made in any of that correspondence about any claimed error about the Hereford-Amarillo rate?

A. None whatever.

Q. None whatever. Was it afterwards that a

claim was made that the Hereford-Amarillo rate had to be collected?

A. Yes.

Q. Now, there is a through route stated in this tariff from Amarillo to the Idaho points?

A. Yes, sir.

Q. To Oregon Short Line points. And there is in the tariff also a specific through rate of \$116.50 in ten car lots from Amarillo to Oregon Short Line points?

A. Yes.

Q. And Amarillo is on the Pecos and Northern Texas as well as on other lines, is it not?

A. It is on the Pecos & Northern Texas.

Q. And on other lines, too, Amarillo is?

A. Amarillo, yes. Amarillo is the junction point there between that line and Fort Worth and Denver City.

Q. And there is a specific statement in this tariff, section 1, to the effect that Hereford takes the same rate as Amarillo?

A. Yes, sir.

Q. And there is also a statement in the tariff that if Hereford—which means that if Hereford did not take the same rate as Amarillo, but if there was a differential, something added to or deducted from the Amarillo rate, that differential could only

be used where there was a routing shown at the back of the tariff?

A. Otherwise it would take the local rate.

Q. The point there being that if there was no routing shown on page 56 of the tariff, they would have to use the local from Hereford to Amarillo?

A. Yes, sir.

Q. If there was a routing shown, then they could use this differential of two, three, five, or ten dollars above or below the Amarillo rate?

A. Yes.

Q. That is true. And in the same explanation of section 1 of the tariff, there is a statement that where there is no differential, that is where the station, the point of origin, takes the same rate as Amarillo, the base point—in a case of that kind, the explanation of the tariff is flatly that the rates shown in section 2 are to be applied?

A. Yes, sir.

Q. And that rate in section 2 from the Amarillo group to Idaho Falls and Pocatello and such points, is \$116.50?

A. Yes, sir.

Q. And that was your basis for construing this tariff as applying the Amarillo rate for \$116.50 from Hereford?

A. And was confirmed by the general freight agent of the Short Line as the correct tariff rate.

Q. That is, it was confirmed when he recognized your overcharge claim?

A. Yes, sir.

Court: Who is the general freight agent?

A. J. A. Reeves.

Q. Do you remember, Mr. Anderson, when you presented your overcharge claim, giving him a specific reference to this live stock tariff?

A. I did, to those particular items.

Q. Which go to the rate all the way from Hereford up? If you have your letter to Mr. Reeves, I wish you would produce it or a copy of it.

A. If it please the court, I will read the first communication.

Mr. Hart: Well, if Mr. Robbins has no objection. That is not strictly the way to do it.

Mr. Robbins: What is the date of it?

Mr. Hart: It is first the copy of his letter to Mr. McNitt of November 11, 1914, and Mr. McNitt's answer of December 17, 1914, and then Mr. Anderson's personal letter to Mr. Reeves of December 23, 1914.

Mr. Robbins: I have no particular objection if the court wants to hear it, but I don't know what it has got to do with the case. We admit we made a mistake in assessing the rate, but if the court wants to hear it I will raise no objection.

Mr. Hart: The only point, your honor, is to



show that Mr. Anderson referred Mr. Reeves in this letter to the particular tariff we are talking about now, so that Mr. Reeves and his associate office had every opportunity for determining whether or not the \$116.50 was the correct rate from Hereford to Pocatello.

Court: After all, that would be hearsay, wouldn't it?

Mr. Hart: Well, it is an admission really. It is an admission against interest of the plaintiff in this case.

Mr. Robbins: If the court please, I cannot follow counsel on that. Now, if it were someone that had not been trying these cases, I could understand it; but here is a man that thoroughly understands we are bound to assess and collect the tariff rate, and it doesn't make a particle of difference what the agent said or what Reeves said or what anybody else said or thought. He knows better than that. It doesn't make that much difference what those people said or thought about it. The question is, what is the tariff rate here?

Mr. Hart: Mr. Robbins doesn't understand the position we take in this case, and that is: Here is a tariff which confessedly is ambiguous; that is, as the evidence now shows, it has been read two ways. We claim it should be read one way, and they have admitted reading it that way for a number of years. Now, then, what is the court going

to do? The court has got to determine what is the correct rate—has got to determine whether or not the tariff was ambiguous—whether or not it can be read in two ways; if not indeed in the one way that we see.

Court: The fact is here that Mr. Reeves agreed with the witness on the stand as to that tariff.

Mr. Hart: That is the ultimate effect of this testimony, yes. And we want it clearly understood that Mr. Reeves was referred particularly to this tariff so that there can be no mistake. There could have been no mistake about his examining the tariff and construing it that way.

Court: I will permit you to read that correspondence. However, I think it is more in the nature of hearsay than it is direct testimony. Reeves would be the best witness here.

Mr. Hart: That is true. Of course Reeves is an officer of the plaintiff company.

Q. Just read those three letters then, your first letter to Mr. McNitt, his reply, and your letter to Mr. Reeves.

A. This letter is dated November 11, 1914. "Mr. A. R. McNitt, Auditor, Oregon Short Line Railroad Co., Salt Lake City, Utah. Dear Sir: Referring to Hereford, Texas, to Pocatello, Idaho, waybills 543 to 559 inclusive, September 28 1912 covering shipment of 17 cars of cattle shipped for the account of

the Portland Cattle Loan Company of North Portland.

We note you have assessed freight charges on basis of rate of \$136.50 per car. Should not the charges have been assessed on basis of rate of \$116.50 as per item section 1, page 26, and item section 2, page 50, W. A. Poteet, Tariff 100-A, your No. 2271-B, permitting the application of the Hereford-Idaho Falls Rate?"

Mr. Hart: Let me interrupt you. Is that this Exhibit 1, that tariff you are referring to?

A. Yes, that is the same tariff.

(Continuing reading): "Your prompt reply will be appreciated. For your ready reference we are attaching copies of freight bills in question."

That was to their auditor who revises all the bills. His reply under date of December 17, 1914:

"With reference to your favor of November 11th, and returning herewith copies of freight bills sent with same.

We find the charges as assessed to be correct. We cannot use rate requested by you, on account of Item 5, of Tariff 2271-B ICC 265, effective Feb. 2d, 1912, which states that intermediate points must be located between two points shown in tariff or two destinations shown and there is no point shown south of Idaho Falls in section 2, of item covering rates and we have therefore used the best rate,

which is combination on Idaho Falls of \$116.50 per car plus \$20.00 Idaho Falls to Pocatello, this rating being in accordance with ICC Rulings."

In other words, he said there wasn't any rate in between the given points, like here is Idaho Falls, here is Pocatello—he contended there was not any point south. Then in my reply I wrote a personal letter to Mr. Reeves under date of December 23, 1914:

"Mr. J. A. Reeves, G. F. A., Oregon Short Line Railroad Comapny, Salt Lake City, Utah. Dear Sir: Your attention is directed to copies of letters exchanged with Mr. McNitt's office in regard to the proper rate to apply on shipments of cattle from Hereford, Texas, to Pocatello, Idaho, shipped Sept. 28, 1912, for the account of the Portland Cattle Loan Co. and the Portland Feeder Co.

It seems as though this rate was based on the through rate of \$116.50 per 36 ft. 6 in. car from Hereford to Idaho Falls, plus \$20.00 Idaho Falls to Pocatello based upon the application of Item 5 of Tariff 2271-B ICC 265.

Our contention is that at the time this shipment moved there were rates published in this tariff both to Rock Springs and Idaho Falls both points of which are on a direct line entitling us to the intermediate rate applicable to the more distant of the two points of which Pocatello is directly intermediate.



Awaiting your further reply, we are, yours respectfully."

Then Mr. Reeves referred this back to the auditor. This is dated January 16, 1915. He says:

"I have your personal favor of the 23rd ult., addressed to Mr. J. A. Reeves, our general freight agent, in regard to alleged overcharge on shipment 17 cars of cattle Hereford, Tex., to Pocatello, Idaho, Sept. 1912.

In my letter to you of Dec. 17th, I returned you the copies of freight bills sent with your letter of Nov. 11th. Will you kindly return these freight bills, and if you are not shown as consignor or consignee of these consignments, will you kindly have an assignment in your favor, or advise if we shall make draft payable to Portland Cattle Loan Co., in care of your firm, as we have authority from our general freight agent to protect the rate of \$116.50 per car as claimed. Yours truly, A. R. McNitt."

Q. Now, the \$116.50 was the Amarillo rate?

A. Through rate from Hereford to Pocatello which had been assessed to Idaho Falls with the local back.

Q. That \$116.50 rate is the rate stated from the Amarillo group to destination?

A. Yes.

Mr. Hart: That is all.



Examination by Mr. Robbins.

Q. Well, now, Mr. Anderson, this first letter you are talking about here from McNitt, that was on December 17th?

A. That is, his reply was December 17th.

Q. Do you know that Mr. McNitt wrote that letter himself?

A. It is signed by Mr. McNitt. I couldn't say as to whether that is his.

Q. You don't know whether he wrote it or not?

A. There is very few of those traffic officers that really deal with the rate situation themselves. They leave it to their subordinates.

Q. That is the point I am getting at. So far as you know, that letter was written by some clerk down there?

A. I wouldn't say as to that, because if I addressed a personal letter to you, calling your personal attention to some discrepancy, it is more apt to go to somebody that will give it proper attention than it is to hand it to an office boy, or rate clerk that don't understand his position.

Q. I don't say office boy. The point I am making is, you don't know that McNitt wrote that letter?

A. That is his signature or his office signature.

Q. What do signatures signify in the left-hand corner there, or the initials I should say?

A. JAS.

Q. That is not McNitt's initials, is it?

A. I wouldn't say as to that. It might be the stenographer's initials. Quite frequently the stenographers put their initials on the corner.

Q. Does J stand for McNitt? There are two—"JAS-J."

Mr. Hart: I don't think there is any point to that.

Mr. Robbins: There is this much point about it. I would like to get this straight. You put it in over my objection.

Mr. Hart: Mr. McNitt or somebody authorized to write the letter.

Mr. Robbins: You are putting this in as an admission of Mr. McNitt.

Mr. Hart: Admission of the Short Line Company.

A. If you go back to the reply where the letter was referred to Mr. Reeves personally, the same party you refer to replies to the second communication. Now, he is apparently one in authority or he would not say "We will pay the claim based on the proper tariff rate."

Q. I am asking you about this first letter now, Mr. Anderson—this first letter of November 11. Did you send that to McNitt under personal cover, you say?

A. No, I addressed it to Mr. A. R. McNitt as auditor—not under personal cover.

Q. This answer you received of the 17th, you don't know whether it was signed by McNitt personally or not?

A. I couldn't say as to that.

Q. Now, then, what was the date of that second letter? That is December 23rd?

A. My letter of December 23rd addressed to J. A. Reeves personally.

Q. That went to Reeves under personal cover?

A. Personal cover.

Q. And that answer to that was on—

A. January 16th.

Q. On January 16th?

A. Signed by the same party as referred to in the letter that you referred to of December 17th?

Q. So that you don't know whether Reeves or McNitt answered either one of those or not?

A. It is signed by A. R. McNitt. Of course I didn't see him sign the letter.

Q. No. Now, you had considerable other correspondence there too, didn't you, with them in connection with this matter?

A. At what time?

Q. Following this—right along following this?

A. We had, I think, some correspondence with

them probably, when the cases were referred back through Mr. Wood's office.

Q. Now, didn't you receive a letter under date of April 30, 1915, from McNitt?

A. Have you a copy of it there?

Q. Yes. Haven't you got them there?

Mr. Hart: They are probably in my files, Mr. Robbins.

Mr. Robbins: Well, I have got them here right handy. That is, I couldn't swear it is a copy. It is marked "Copy."

Q. Did you get that letter, do you recall, or could you testify?

A. Excuse me just a minute.

Q. Certainly.

Mr. Hart: Let me see it?

Court: You say this is 1913?

Mr. Robbins: This follows right after that other correspondence.

A. This is 1915.

Mr. Hart: This is April 30, 1915, and this is the letter which evidently first makes the claim that the Hereford-Amarillo situation was wrong. No doubt we got that.

Court: He changed his mind.

Mr. Hart: He changed his mind between February and April. That is the point.

Q. Are you willing to say that that is a copy of the letter, that has been made by somebody—I don't know who? Do you recognize it?

A. I think there was such a letter in the file.

Q. Well, just read that letter to the court, will you?

Mr. Hart: Here is the original, Mr. Anderson. It is not pertinent, but I have no objection.

Mr. Robbins: Go ahead, read it.

A. It says: "Salt Lake City, Utah, April 30, 1915. Claim 8274-13-9. 8274-31-9. Mr. Geo. F. Anderson, Agent Union Meat Co., No. Portland, Ore. Dear Sir: On Jan. 30, 1915, under our voucher No. 0-14140, we paid you \$387.70, which amount included \$47.70, interest, on what we supposed was legitimate overcharge on shipment 17 cars cattle from Hereford, Tex., to Pocatello, Ida., moving Sept. 28, 1912.

"On Feb. 17, 1915, per our voucher 0-14411, we paid you \$228.00 of which \$28.00 was interest on 10 cars cattle between same points on same date.

"The above result was secured by using a rate of \$116.50 per car from Hereford, Tex., to Pocatello, Ida., and I regret to advise that we now find same to be in error and that the correct rate should be on combination of locals over Amarillo being \$26.40 for a 36-ft. car Hereford to Amarillo, as per Panhandle & Santa Fe Tfr. 6016-F, ICC-6769; and



\$116.50 for a 36-ft. car, Amarillo to Pocatello, Ida., per O. S. L. Tariff 2271-B, ICC-265. I am therefore compelled to request of you refund of the amounts paid you in error, totaling \$615.70.

“Will appreciate your prompt attention in this. Yours truly, A. R. McNitt.”

Mr. Robbins: We offer this original letter in evidence, your honor, and ask that it be marked.

Mr. Hart: It has been read into the record.

Mr. Robbins: We will withdraw it. I don't want to break up his record, your honor.

Q. Now, you wrote another letter there to McNitt, on the 3d of May, didn't you, in connection with this same matter?

Mr. Hart: There is no point to this added correspondence.

Mr. Robbins: There is this much point—we want to explain it. He was so anxious to explain this situation—let us have it all.

Mr. Hart: These parties corresponded for an ensuing year or more, until suit was brought, one contending that the Hereford-Amarillo rate had to be charged and the other denying it.

Court: I think that is the trouble of getting into this correspondence at all.

Mr. Hart: I merely brought in the admission, in the first place, of the Oregon Short Line.

Court: Now, then, the attorney on the other

side is showing that they changed their mind, which is conceded.

Mr. Hart: They have shown that, and I made no objection to their showing it. But why should we go on now?

Mr. Robbins: Why should we start? That is the question in my mind.

Mr. Hart: We had a distinct purpose in starting.

Mr. Robbins: You contend they started. Now, you started; I have a right to show what transpired.

Court: What is the question now?

Mr. Robbins: I asked him if he didn't also write a letter to McNitt under date of May 3, 1915. I will withdraw that. There is no sense in this in the first place. That is all.

Examination by Mr. Hart.

Q. So that, Mr. Anderson, April 30, 1915, was the time when it was first suggested that the Hereford-Amarillo local rate had to be collected?

A. Yes.

Q. That was that letter of Mr. McNitt's of April 30, 1915, relating to the two shipments moving August and September, 1912?

A. Yes.

Q. And it was April 30, 1915, when this first suggestion—the suggestion was first made that it

was necessary to collect local from Hereford to Amarillo?

A. Yes.

Examination by Mr. Robbins.

Q. I notice here in the correspondence that you stated to Mr. McNitt that you intended to refer this whole matter to the Interstate Commerce Commission for a ruling. Did you ever do that?

A. We couldn't—you couldn't refer it to the Interstate Commerce Commission for a ruling, because they wouldn't recognize—they don't recognize the shippers.

Q. Well, beg your pardon, Mr. Anderson. I understood that you told Mr. McNitt you intended to do that?

Mr. Hart: That wouldn't make any difference anyway.

A. That wouldn't make any difference.

Mr. Robbins: Let me find out.

A. The Interstate Commerce Commission would not recognize anything of that kind. If you will allow me to explain that; where a shipper is overcharged, within the limitations of two years you cannot take it up with the commission.

Q. You didn't take it up with the commission?

A. I say you couldn't take it up with the commission.

Q. You said in your letter here you intended to?

A. Well, I intended to—sometimes you say that just as—

Q. As a bluff?

A. As a bluff, yes.

Mr. Robbins: That is all.

Examination by Mr. Hart.

Q. The Interstate Commerce Act provides a two-year limitation from the time of shipment, I understand?

A. Yes.

Q. So that, although the carrier may come in several years later and try to collect the under-charge, the shipper cannot ask reparation after two years from the time of shipment?

A. After two years.

Excused.

Court: So that rule doesn't act both ways, then?

Mr. Hart: No, that is the unfair part of it, and I suppose some time it will be rectified.

Mr. Robbins: If the court please, counsel tells me that Mr. Lothrop is still in as much of a hurry as he was last night. I think I would like to accommodate him if he wants to get away.

Court: Very well.

J. H. Lothrop, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Hart:

You are anxious to get through by noon here, Mr. Lothrop, I understand?

A. I am. I would like to get through.

Q. You are traffic manager of the Portland Traffic & Transportation Bureau, Mr. Lothrop?

A. Secretary.

Q. Secretary. And in charge of rate and traffic matters for that association?

A. Yes, sir.

Q. That association comprises jobbers and manufacturers in Portland?

A. Jobbers and manufacturers, distributors generally.

Q. How long have you been engaged in rate work?

A. Nearly thirty years.

Q. Where abouts, briefly?

A. I commenced to work for the Union Pacific at Omaha thirty years ago and remained with that company about twenty years, most of the time in the traffic department. After that I went to Spokane, was general freight agent of the Spokane & Inland—was with them about two years. I have



forgotten the exact time. Was out of the service for something less than a year. Was then with the North Coast Railroad. And then came to Portland five and a half years ago; became secretary of the traffic—manager at that time of the transportation committee of the Chamber of Commerce, which was afterwards merged with the Chamber of Commerce, and then separated a year ago under the present association.

Q. So that after this period of railroad experience, traffic experience for the railroads, after that and for the past five and a half years you have been representing this traffic bureau, or rather the Traffic and Transportation Association and its antecedent bureau?

A. Yes, sir.

Q. And your work in that respect has had to do with the construction of tariffs?

A. Well, not the construction of the tariff.

Q. I mean construing them. I don't mean making them.

A. Construing them, yes.

Q. Have you participated in many rate cases and many discussions of rates?

A. Quite a number.

Q. Before the Interstate Commerce Commission?

A. Yes, sir.

Q. You are engaged usually with Mr. J. N. Teal in the handling of rate work, are you not?

A. Yes, sir.

Q. Mr. Lothrop, have you examined this tariff, Joint Live Stock Tariff No. 100-A, W. A. Poteet Agent, which is plaintiff's Exhibit 1 in this case, at my request, to determine the rates stated therein on live stock in ten carload lots from Hereford, Texas, to Pocatello, or Idaho and Montana points generally, on the Oregon Short Line?

A. Yes, sir.

Q. What do you find as the rate quoted by that tariff 100-A?

A. In my opinion, the correct rate on cattle in 10-car lots from Hereford to Pocatello is \$116.50 per car.

Q. Now, I call your attention first to the manner in which that tariff is constructed. There is first section 1, is there not?

A. Yes.

Q. Now, tell what is section 1 of the tariff? What does it aim to do?

A. Section 1 of the tariff names the basis of rates from various points in the Southwest, stating whether the rates shall be from certain points the same as basing rates, or whether they shall be arbitraries above or differentials below those basing rates.

Q. That is, there are certain base points stated, and Amarillo is one of those base points?

A. Amarillo is given as one of the base points, yes, sir.

Q. And then there is a list of stations which either take the Amarillo rate, or which take something a little over or something a little under?

A. Yes, sir.

Q. And when it takes a little over you call it an arbitrary, and when it takes something under it is a differential, or is the word "differential" applied to both?

A. I think they use "differential" in both cases here. Sometimes where the addition is found, it is usually called an arbitrary; while below, or a deduction, it is frequently called a differential.

Q. But this tariff refers to both as differentials, that is, above or below the base point rate?

A. Yes, sir.

Q. What do you find in section 1 as to the station of Hereford, where these shipments originated?

A. Hereford is indexed as No. 98 on page 26 and takes the Amarillo rate basis. There is no addition or no deduction shown; no arbitrary or differential.

Q. But that is the section of the tariff showing points of origin?

A. Yes, sir.

Q. And the basis of rates from the points of origin?

A. Yes, sir.

Q. And you find there that Hereford takes the Amarillo rate?

A. Yes, sir.

Q. Now, where do you find the Amarillo rate?

A. The Amarillo rate is shown in section 2 of the tariff.

Q. Referring you to page 50 of section 2.

A. On page 50 the rate of \$116.50 is shown as applying from Amarillo to Idaho Falls on the Oregon Short Line. Pocatello is not specifically mentioned but is intermediate to Idaho Falls, and the Pocatello rate cannot exceed the Idaho Falls rate. Therefore the Idaho Falls rate applies at Pocatello.

Q. And does this tariff also show the same, or a rate from the Amarillo group to Dillon?

A. Dillon \$125.00, yes, sir.

Q. And Dillon is on the way up to Butte?

A. Yes, sir, north of Pocatello and south of Butte.

Q. So to get the Butte rate they would take the Amarillo group rate to Dillon and add the local to Butte?

A. I should think so, yes.

Q. Now, section 2 of this tariff undertakes to do what?

A. Well, section 2 of the tariff actually names rates to various destinations from certain groups.

Q. From these different groups?

A. From the different groups, yes, sir.

Q. All right. Now, turn back to section 1 of the tariff, which, as you explained, lists the points of origin, and states the rates from those points of origin. Do you find anywhere there any reference to section 3 of the tariff, where the routing and application of certain rates is shown—do you find any reference in section 1 to section 3 which would limit any of these rates stated in sections 1 and 2?

A. Yes, there is limitation on some of them.

Q. Now, what is that limitation?

A. That limitation or restriction is placed against stations, originating stations that take a differential.

Q. Originating stations, did you say?

A. Originating stations taking differential rates.

Q. Taking differential rates?

A. Differential above or below the base rate.

Q. And you find the limitation on page what of the tariff?

A. It is on page 24.

Q. And that reads how?



A. That reads "The differentials shown in section No. 1 are to be added to or deducted from the Amarillo, El Paso, or Deming rates as shown in section No. 2 hereof, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69."

Court: Just a moment.

A. That is on page 24, your honor.

Court: Now, you refer to page 57?

A. "Provided on pages 56 to 69," yes, sir. And 57 would come in under that grouping.

Q. Well, now, I want to ask you, on page 57, Pecos & Northern Texas Railway, following that out to the O. S. L., there is a blank left there?

A. Yes, sir.

Court: There is no rate given. How do you construe that?

Q. That applies, your honor, according to the reading of the tariffs, where differentials are shown in section No. 1.

Q. That is, Mr. Lothrop if I understand you correctly,—suppose Hereford was shown in section 1 as taking a differential of \$2.50 over Amarillo, supposing, just for the purpose of illustration, that instead of showing Hereford to be in the Amarillo group and taking the same rate, Hereford was shown as \$2.50 above the Amarillo rate, as some stations are so shown in section 1—

A. Yes, sir.

Q. Now, there would be that differential, so called, of \$2.50?

A. Yes.

Q. Now, then, under this explanation, you go back to page 57, and finding no route number with the Oregon Short Line, it would mean that you could not use that \$2.50 over Amarillo but would have to charge the local—have to pay the local rate from Hereford to Amarillo?

A. Yes, sir.

Q. That is correct, is it? But that is the case where the tariff showed a differential, an added charge over or a deduction from the Amarillo rate?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. And where, on the other hand, the tariff shows the Hereford rate and the Amarillo rate to be the same, that is, where there is no differential, do you find then any reference to page 56 or 57 of the tariff, which might make that application of the Amarillo rate improper?

A. No, sir.

Q. What is the explanation which covers cases where the rate is the same, as in the case of Hereford and Amarillo?

A. That is provided for in the second paragraph

of page 24, which reads, "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in section No. 2 are to be applied as indicated." That is entirely separate and distinct from paragraph No. 1 shown on page 24. It positively fixes the rates from Hereford to be the same as the rate from Amarillo. If it had been intended to refer to pages 56 to 69, or to 57, as that chart is given on, they should have been included in the second paragraph, or the one where it reads to start with, "Where no differentials are shown." There should have been included in that paragraph the same reference to those pages in section 3 as are covered in the first paragraph of page 24. There is a positive statement there as to the Hereford rate being the same as the Amarillo without any restriction or any qualification.

Q. So that, according to those two explanations on page 24, originating points which take a slightly higher or lower rate than the Amarillo rate can only be given that slightly higher or lower rate where there is a route number shown on page 57 of the tariff?

A. Yes, sir.

Q. But on the contrary, where there is no differential, where the tariff shows the Hereford rate the same as the Amarillo rate, there is no differential, then the explanation on page 24 makes no reference to the chart, or to the routing at pages 56

to 69, and there is no such limitation as to that application as there is to the case where a differential appears?

A. Yes, sir.

Q. So that, in your judgment, as a rate expert, the meaning of that tariff taken as a whole, taking sections 1 and 2, with the explanations given in it, the meaning of that tariff is to quote a rate of \$116.50, the Amarillo rate, from Hereford?

A. Yes, sir.

Cross Examination.

Questions by Mr. Robbins:

Now, Mr. Lothrop, as I understand your testimony, you are testifying that Item 200 there, under section 1, only applies where there are no differentials? Is that correct?

A. No. Page 24 refers to both where there are differentials and where there are no differentials.

Q. The first part I am talking about now.

A. The first part?

Q. The first part of Item 200 there. Yes, the first paragraph there.

A. I understand.

Q. I understand you to testify that that only applies in cases where there are no differentials?

A. That is just what it says, sir.

Q. That is your testimony?

A. Yes, sir.

Q. And where there are no differentials named, then you construe the tariff as meaning that Hereford would take the Amarillo rate?

A. Absolutely so. There is no restriction whatever—no further reference. It says positively, "Where no differentials are shown, the Amarillo rates, as shown in section No. 2, are to be applied as indicated."

Q. Yes. Well, now, Abernathy takes a differential over Amarillo, doesn't it?

A. Yes, sir. Abernathy takes a differential of \$8.80.

Q. \$8.80 over Amarillo?

A. Yes, sir.

Q. Now, what would be the rate, then, according to your construction of the tariff, from Abernathy to Pocatello?

A. From Abernathy it would be a combination on Amarillo.

Q. It would be a combination on Amarillo?

A. Yes, sir.

Court: \$8.80 would be added to the \$116.50?

A. No, the local rate from Abernathy to Amarillo would be added to the \$116.50.

Q. That would be the local of \$39.60, then, added to the \$116.50?



A. I don't know what the local is; whatever the local rate is.

Q. Well, it is \$39.60, some of the witnesses testified. So that would make the through rate from Abernathy, then, \$156.10, or whatever the local added to the \$116.50 would make?

A. Yes, sir.

Q. Well, why do you make that rate on a combination over Amarillo?

A. Because there is a differential applied from Abernathy.

Q. What is your authority for that in the tariff?

A. There is a differential of \$8.80 is found against the index.

Q. I know. But the rule, Mr. Lothrop?

A. That is the first paragraph on page 24, section No. 1, which provides for differentials, where it says where the differentials are shown. Then you are further referred to the applications provided on pages 56 to 69. I think page 57 is the particular page that you would refer to.

Q. Yes, that is where the chart is.

A. Yes, sir.

Q. Well, now, there is no differential shown for Hereford, you say?

A. No, sir.

Q. Well, now, what does the second paragraph of Item 200 refer to? What does that mean?

A. It means just what it says, I presume.

Q. Well, we thought so, but we don't seem to be reaching the same conclusion. I want your theory as to what it means.

Mr. Hart: You mean you thought so for the first two years.

Mr. Robbins: Oh, no, no. We are not like these traffic men—we admit we make mistakes sometimes, Mr. Hart, try to get them right.

Q. What construction do you place on the second paragraph of Item 200 there?

A. Just what is previously stated, Mr. Robbins, that the Amarillo rate applies from Hereford.

Q. The Amarillo rate applies from Hereford?

A. Yes, sir; just as it says, just as plain as language can be written, it seems to me: "Where no differentials are shown, the Amarillo rates as shown in section No. 2 are to be applied as indicated."

Q. Well, now, how are they indicated in section 2?

A. Section 2 shows right there, \$116.50.

Q. No, the note I mean—the note to section 2?

A. You refer to Item 205?

Q. Yes, the part that is underlined in pencil there by somebody.

A. On page 32. Do you want me to read it?

Q. No, just the application part of it—the application and routing?

A. Well, it is pretty hard to separate it. “The rates shown in section No. 2, in columns headed ‘Amarillo’ and ‘El Paso-Deming,’ are to be applied from stations shown in section No. 1, as taking Amarillo or El Paso-Deming rate basis, or same are to be used as a basis for arriving at through rates from stations shown in section No. 1 as taking differentials over or under Amarillo or El Paso-Deming rates, where application and routing is provided on pages 56 to 69 inclusive from such point of origin to the destination station.” “See also Item 200, page 24.”

Q. That is referring us right back to where we started from?

A. Yes sir.

Q. Well, now then, Hereford is located on the P. & N. T., isn’t it?

A. Yes sir.

Q. How do you construe any authority under the note to section 1 or section 2 to make a through rate on the P. & N. T., in view of the chart on page 57?

A. I think that the reference, the further reference under that paragraph, “See also Item 200, page 24,” you are referred right to that, and it shows there absolutely, plain as language can be written,

that where no differentials are shown the Amarillo rate as shown in section 2 is to be applied.

Q. Yes, in those cases where there is a through routing provided on page 57?

A. In other words, that absolutely nullifies Item 205 shown on page 32, just as section 3, page 57, absolutely prohibits the application of the Amarillo rate from Hereford under paragraph 1 of section 1.

Q. That note to section 1 and the note to section 2 in effect just refer back and forth, and both of them depend on page 57 for their routing and application, don't they?

A. No. After reading section 2 you are referred right back to section 1.

Q. That is what I am trying to say, yes.

A. In other words, I think section 2 would govern. Well, I don't know whether it would govern or not—it would be very conflicting if section 2 did not provide that reference to Item 200 on page 24. But after it does refer you back to that, and it states positively just what rates should be applied, it seems to me section No. 2 is without force so far as the Hereford rate is concerned, where no differential is shown.

Q. We are agreed, however, that on page 57 there is no through routing shown from P. & N. T. points to O. S. L. points, aren't we?

A. Yes.

Redirect Examination.

Q. There is a through routing shown from Amarillo to Idaho points, is there not, Mr. Lothrop?

A. Yes.

Q. Amarillo is a P. & N. T. point?

A. It is the northern terminus, I think. I am not sure about that.

Q. The northern terminus of the Pecos & Northern Texas. So that the chart is not strictly accurate in saying there is not any through routing from any P. & N. T. point to any O. S. L. point?

A. That is correct, sir.

Q. Whatever the note to section 2 says, you are referred back to the note to section 1, which makes the positive statement that in cases where there are no differentials over or under the basing point, then the flat basing point rate is to be applied?

A. Positive statement written just as plainly as it could be written in the English language.

Recross Examination.

Q. Well, now, as a traffic man, Mr. Lothrop, where the chart says there is no through rate from P. & N. T. points to O. S. L. points, do you still construe Amarillo as being a P. & N. T. point, simply because it is a junction—from a traffic standpoint, now?

A. Well, I don't know how you can get away



from it. If the P. & N. T. runs into Amarillo, it must certainly be a P. & N. T. point.

Q. Well, now, might not the Fort Worth & Denver City have their own switch track there in Amarillo?

A. Yes. It might be also a Fort Worth & Denver City point.

Q. That is what I thought I said, Fort Worth & Denver City. So, from a traffic standpoint, in view of the chart there, you construe Amarillo as being a P. & N. T. point?

A. I don't know about the chart part of it. Amarillo is a P. & N. T. point, if that is what you mean.

Mr. Robbins: That is all.

#### Redirect Examination.

Q. Is there any reason why a shipper, or anyone else, seeking to find out what the rate from Hereford to Idaho points might be—is there any reason, so far as you can find, why he might not rest content with what is shown in sections 1 and 2 of that tariff, without going to a section 3?

A. I see no reason why he should go to section 3 after reading that paragraph in section 1. That absolutely fixes the Amarillo rate from Hereford—the same rate from Hereford as from Amarillo. I don't know why he should go any farther. If there had been any intent on the part of the carriers to have you refer to section 3, it should have been so

stated in the second paragraph, page 24, of section No. 1, exactly the same as was stated in the first paragraph.

Q. That is, in the paragraph about differentials?

A. Yes.

Q. Which governs as in case of stations like Abernathy, where there is a differential shown?

A. Yes.

Q. To stations where there are no differentials?

A. You are referred to that particular part of section 3, and if the same was intended to apply where there was no differential shown from the points of origin, why, that should also have been included in the second paragraph. The two paragraphs are absolutely separate and distinct. You cannot read a part of the first paragraph into a part of the second—into the second paragraph.

Q. Whether or not any through route was shown by any part of the tariff between Pecos & Northern Texas points and Oregon Short Line points, there was a through route from Amarillo?

A. Yes, sir.

Q. And it was entirely possible for the carriers concerned to absorb, as they call it, the local from Hereford to Amarillo and make the Amarillo rate applicable from Hereford?

A. Yes, sir.

## Recross Examination

Q. Well, now, your criticism of the tariff is purely your opinion as to how a tariff should be constructed?

A. No, I am not telling you how it should be constructed. I am undertaking to show my interpretation of the tariff as it reads.

Q. I thought you were criticising the construction of the tariff?

A. Oh, no.

Q. Oh, you have no criticism to offer of the construction of the tariff?

A. Well, I could offer some criticism, but I don't know.

Q. I am asking you what is the fact—are you or are you not?

A. No, I am not.

Q. You are not. I understood you were.

A. I am not criticising the tariff, no.

## Examination by the Court.

Q. I do not yet understand how you make the estimate of the rate from Abernathy, where it has a differential. The estimate was made from Abernathy, Texas, 105 miles to Amarillo, and a charge was made of \$39.60. That is added to the Pocatello rate from Amarillo, \$116.50, which makes the rate from Abernathy to Pocatello \$156.10. I would

like to know why it is that you disregard the differential of \$8.80?

A. We disregard the differential, your honor, for the reason that in paragraph No. 1 of section No. 1 shown on page 24, where application and routing is provided on pages 56 to 69. Then when you turn to page 57 you find that those through routes do not apply where a differential is shown.

Q. Is that that blank space left there?

A. Yes. But that applies, according to the reading of the tariff, that part of the tariff is to be used only where differentials are shown.

Q. Then in making a rate you disregard the differential?

A. And add the local.

Q. You add the local?

A. Yes.

Mr. Hart. There is no dispute, your Honor, between counsel and myself as to that feature, and perhaps we can make it plain if it is not already plain.

Court: Well, then, according to this construction there would be a part of this matter that would be recoverable?

Mr. Hart: I think so. I think as to the Portland Feeder Company, that part of its shipment which moved from Abernathy must take the local rate from Abernathy to Amarillo.

Court: Then the mistake, according to your idea, was made in the first instance?

Mr. Hart: Evidently; because this tariff says that you can only use these differentials, such as that \$8.80 differential, where there is a routing shown on page 57.

Court: I see. It is pretty hard for me to understand. I will get it after a while.

Mr. Robbins: Do I understand you that we can eliminate the Feeder part of the case, then?

Mr. Hart: Only part of the Feeder case, because some of its shipments moved from Abernathy. So far as that Abernathy shipment is concerned apparently this tariff does not permit using the differential, but requires the local, because there is no routing shown. But the difference between that and all of the rest of the situation arises because all of the rest of the shipments originated at Hereford, which takes no differential, and the language of this second paragraph of section 1, which governs the situation when there is no differential, contains no such limitation; contains no reference to the chart and the routing, gives express authority for the use of that flat rate whereas in the case of Abernathy, where there is a differential, you can only use the differential, it says, where application and routing is provided on pages 56 to 69; but it is the failure to have that clause when the note speaks of stations like Hereford



which takes no differential, failure to have any reference to the application and routing on pages 56 to 69, and the explicit statement that the flat rate as shown in section 2 is to be applied, makes the difference.

Mr. Robbins: Mr. Hart, do I understand you are willing to concede we are entitled to recover on the Abernathy shipments, whatever they may be?

Mr. Hart: I think so, unless they are part of the ones which went beyond Butte, to a Chicago, Milwaukee & Puget Sound point. If they did that we have a radically different situation because then we have a situation originating at a Pecos & Northern point and going to a Chicago, Milwaukee & Puget Sound point, and there is a route number in the chart as between those carriers, so that I am not clear as to that.

Your Honor, I think there is no doubt but what a recovery is to be allowed so far as that part of the Feeder shipment which originated at Abernathy is concerned. Am I right in that, Mr. Lothrop?

A. I didn't catch that.

Q. That the Abernathy shipments, whatever shipments there were originating at Abernathy, under this tariff would have to be charged the Abernathy-Amarillo local rate?

A. Moving up over the Short Line.

Q. Yes.

A. Yes.

Mr. Hart: That is correct. I think I can make that admission in the case.

Mr. Robbins: That practically eliminates the second cause in the Feeder case.

Mr. Hart: Yes, I think that is correct.

Mr. Robbins: There were 32 cars there, 21 cars Abernathy to Pocatello, then 11 cars, making a total of 32 from Abernathy to Pocatello and American Falls.

Court: How much does that amount to in money?

Mr. Robbins: \$627.20.

Mr. Hart: I don't want to make that admission any broader than is necessary now, because I still want to reserve the right to check Mr. Robbins' proof, and if payment can be avoided I want to avoid it, because, of course, it is iniquitous so far as the individual shipper is concerned. But I do admit now that, so far as these Abernathy shipments are concerned, it was necessary under the tariff to charge the local rate from Abernathy to Amarillo.

Mr. Robbins: Well, then do I still understand, Mr. Hart, that you want me to go ahead with my proof on the second cause of action?

Mr. Hart: Well, I think I have made the admission about as broad as I can.

Court: Is that all?

Mr. Hart: That is all I have with Mr. Lothrop.

Mr. Robbins: Yes, that is all.

Excused.

R. A. Rankin, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Robbins:

Q. What is your business?

A. I am a clerk in the accounting department of the Oregon Short Line Railroad.

Q. In charge of what particular branch of the work?

A. Collection of undercharges.

Q. Who is your superior?

A. Mr. L. R. Wood, Auditor.

Q. L. R. Wood is the Auditor for the Oregon Short Line?

A. Yes sir.

Q. At Salt Lake?

A. Yes, sir.

Q. And you are the clerk in charge of undercharges under Mr. Wood?

A. Yes, sir.

Q. Now, how long have you been in charge of the undercharge bureau?

A. Nearly a year—11 months I believe.

Q. What were you doing previous to that time?

A. I was connected with the freight accounting department of the same company.

Q. And how many years railroad experience have you had in connection with undercharges and rates and things of that kind?

A. Twelve years.

Q. Now, as the head of the undercharge bureau, have you had any occasion to look into these cases which are in contest here today?

A. Yes.

Q. You are familiar in a way with those depositions that were taken that have not yet arrived?

A. Yes.

Q. I will ask you if the original contract and original waybills and some of those other original documents are attached to those depositions which are floating around Portland some place?

Mr. Hart: Well, I think we will wait and see about it. I object to that.

Mr. Robbins: He knows. He was there when they were taken.

Mr. Hart: Maybe he does, but he is not allowed to tell that.

inal documents to show why I am going to ask this witness some questions.

Court: I understand you are going to have those here?

Mr. Robbins: Yes, if counsel insists, I suppose.

Court: I will allow you to go ahead.

A. The original waybills and documents issued at the point of origin are attached to those depositions.

Q. Have you any duplicate originals here that we could use temporarily, of any of those documents?

A. I have the original contracts, or they are in the exhibits, covering that portion of the movement from Denver, Colorado to Pocatello, Idaho, I have in my possession here some original duplicates of contracts issued while the shipment was on the line of the Colorado & Southern. The balance of them are attached to those depositions.

Q. Have you any duplicate originals of any of the contracts entered into at any of the Texas points?

A. No, sir.

Q. They are all attached to that deposition?

A. Yes, sir.

Q. Well, have you any original waybills with you?



A. No, sir.

Q. When did you first have anything to do with the Portland Cattle Loan situation?

A. In the month of June of last year.

Q. June of last year. Just tell the court how it was turned over to you, or what you were doing at that time with it.

A. I was connected with the freight accounting department shortly prior to that time and was transferred from the freight accounting department to the miscellaneous accounts, where the undercharges are handled, with a view of taking charge of the undercharges and adjusting them in the account as was, or is found to be proper. This claim against the Portland Feeder Company and the Portland Cattle Loan Company—

Q. Pardon me just a moment. By "this claim," what are you referring to? Are you referring to these exhibits 4 and 5?

A. Well, that is a portion of the claim.

Q. Make it a little more specific if you can.

A. The undercharges against the Portland Feeder Company and the Portland Cattle Loan Company were retained in the account, and came to me as a portion of my duties, to see that the matter was properly adjusted; that is, determine if the amount we were endeavoring to recover was the correct amount, and if it was not the correct

amount, to adjust the matter in our account to the correct basis and secure settlement of the undercharge. That is the manner in which I came in contact with the conditions entering into the transportation of these cattle, the collection of charges on the cattle from the Texas points to Pocatello, American Falls, Monida, and Butte, final destination, Piedmont on the last shipment.

Q. Just state briefly, without going into details, how you checked this matter up; just a brief outline of how you checked this matter up and what you did.

Mr. Hart: This was just last summer, was it?

Mr. Robbins: Well, it is when he took charge there.

Mr. Hart: I cannot understand how that could be material, your Honor.

Court: Well, I suppose it is really a construction of the tariff that we are getting at.

Mr. Robbins: This man was called upon to construe the tariff.

Mr. Hart: The claims were made, of course, long before that.

Court: You say they were?

Mr. Hart: Oh, yes, the claim was made on us in April, 1915, three months after the Idaho refund had been made.

Court: And this is last June?

A. Yes, sir.

Mr. Hart: This is last June, this witness is testifying to.

Mr. Robbins: You see we paid some money in error. We are trying to get it back.

Mr. Hart: I don't admit that. The payment to us was entirely proper. No one has ever disputed it. The dispute is in reference to the Texas end of the situation. The overcharge to us was entirely proper.

Court: The real condition is, as far as this witness is concerned, he is being offered as an expert—isn't that it?

Mr. Robbins: Partly, your Honor, and partly as to what actually transpired there in the accounts. He handled the accounts and made the payments. He is the man who actually handled it.

Court: Back in 1915?

Mr. Hart: No.

Q. Did you handle any of it in 1915?

A. Not as or in an endeavor to effect any adjustment by and between the Feeder Company or the Portland Cattle Loan Company and our company. At that time I was connected with the freight accounting department. I recollect distinctly the situation as it came up and how it came up. That is all.

Mr. Hart: But the first time you officially took hold of it was last summer?

A. Yes.

Mr. Hart: Well, now, if he wants to ask him if he examined the tariffs and what his opinion is, all right, I have no objection, because he has made some attempt to qualify.

Mr. Robbins: This man actually checked those payments and made them, your Honor. I want to offer him both as an expert and as to what he actually did there.

Court: Very well, go ahead. The court will hear you.

Q. In checking these rates, is it any part of your duty, or did you undertake to apply the tariff to these shipments to see what the correct charges were?

A. Yes.

Q. And what experience have you had in interpreting tariffs?

A. Well, I have been an agent of one or more companies, and as such I am required to base the charges on freight and passengers from here to there in the assessment and collection of charges. I have been employed in the revision department of the Oregon Short Line Company, in the accounting department—the revision bureau of the accounting department, where all waybills entering our

office are revised and determined that the charges are properly assessed.

Q. What is the fact as to whether or not it is part of your duties to check these different bills as they come through and see whether or not the tariff has been properly applied?

A. It is.

Mr. Hart: It is now part of your present duties?

A. Yes, sir.

Q. And before you took the position, there was another man doing the same thing?

A. Yes, sir.

Mr. Robbins: The point I am getting at is, his department is the one that checks these.

Q. Now, Mr. Rankin, I am now referring to the Portland Cattle Loan case. I will ask you if you checked up a shipment of 44 cars of cattle moving from Hereford to Pocatello and Butte on September 28, 1912, consigned by Greenameyer to the Portland Cattle Loan Company finally? That is they finally got it.

A. Yes, sir.

Q. I will ask you if you made a memorandum that is, took a memorandum off from your files showing the different cars and the movement and the application of the rates as you construe them?

A. Yes, sir.



Q. I will ask you if that is the statement his Honor has there, which was prepared under your jurisdiction?

A. Yes, sir.

Q. I will ask you, while we are about it, if you prepared a similar one for the Feeder Company?

A. Yes, sir.

Mr. Robbins: We offer these two statements in evidence, for the purpose of expediting this witness's testimony more than anything else.

Court: Have you any objection?

Mr. Hart: Not if it will assist your Honor. I don't suppose they are technically admissible.

Court: Do you want this plat to go with it?

Mr. Robbins: Yes, I guess that may as well go in.

Statements marked plaintiff's Exhibit 6 and plaintiff's Exhibit 7, and plat marked plaintiff's Exhibit 8.

Q. Now, Mr. Rankin, I will ask you if you are familiar with the southwestern territory down there, in around Amarillo?

A. Yes.

Q. And what railroad is it that extends from Hereford and Abernathy to Amarillo, if you know?

A. The Pecos & Northern Texas.

Q. And what road from Amarillo to Texline?

A. Fort Worth & Denver City.

Q. And from there to Denver?

A. The Colorado & Southern.

Q. And Denver to Granger?

A. Union Pacific.

Q. And Granger to American Falls, Pocatello, Idaho Falls, Monida, Dillon and Butte?

A. The Oregon Short Line.

Q. And Butte to Piedmont?

A. The Chicago, Milwaukee & Puget Sound.

Q. Now, referring to this statement which was prepared, how did you arrive at the computation of \$26.40 on that G. H. & S. A. car from Hereford to Amarillo?

A. How did we arrive at it?

Q. Yes: you show here that the correct charge is \$26.40.

A. Yes.

Q. How did you arrive at that?

A. The rate is that quoted in A. T. & S. F. Company's tariff 6016-E.

Q. Well, now, you mean this plaintiff's exhibit 1, is that the tariff you are talking about?

A. Plaintiff's exhibit 2.

Q. Plaintiff's exhibit 2, oh, yes. Well, go ahead and explain to the court now how you made that \$26.40.

A. Amarillo is a town located a little south and west from Hereford. I mean Hereford is a little town located south and west from Amarillo; in fact, 47 miles from there, as indicated in the various tariff sheets; and in accordance with provision of the tariff, which is on a mileage basis, we apply the rate applicable to a shipment moving 50 miles, by reason of a note in the tariff that says, "When exact distance is not shown, use next greater distance."

Q. Refer to the page in the tariff you are reading from.

A. This is page 2 of Supplement No. 5. of A. T. & S. F. tariff No. 6016-E, I. C. C. No. 5820; and the rate for the transportation of this shipment for 50 miles is 12 cents per hundredweight on cattle in carload quantities with a minimum weight of 22,000 pounds, as provided in this tariff on that page.

Q. Mr. Rankin, in referring to those, please refer to them as plaintiff's exhibits 1 and 2 instead of the I. C. C. numbers.

A. Yes. I believe that describes the rate from Hereford, Texas, to Amarillo, does it not?

Q. Did you state that was a mileage of 47 miles?

A. Yes.

Q. And under the note in the tariff, you apply the mileage of 50 miles?

A. Yes.

Q. That makes your local, then, from Hereford to Amarillo of \$26.40?

A. Yes.

Q. How did you arrive at the computation of the rate from Hereford to Pocatello that you show here?

A. Hereford to Pocatello?

Q. Yes, you say the correct rate here is \$142.90, Tell the court how you arrive at that.

Court: From Amarillo to Pocatello?

A. From Hereford to Pocatello.

Court: I think I understand that. That is by adding the local rate to the rate from Amarillo to Pocatello. That was described by Mr. French very clearly.

Q. That is correct, is it not? It is a combination of the local plus \$116.50?

A. Yes, sir.

Q. Now, then, the same computation, the same system would be used in the Hereford-Butte rate of \$171.20?

A. Yes, sir.

Mr. Hart: There is no dispute about those things.

Mr. Robbins: Yes. Well, I am just merely explaining how he arrives at this.

Mr. Hart: Mr. French explained it fully.

Mr. Robbins: Yes.

Q. Now, do you find a through rate from Hereford to Pocatello in that tariff?

A. Yes. No, not from Hereford to Pocatello—beg pardon; not from Hereford.

Q. What do you find with reference to Hereford?

A. Hereford, Texas, is a point located on the P. & N. T. Railway. I do not understand that any other railway passes through it or enters it excepting the P. & N. T. Railway. A rate is dependent to a greater or less extent upon the route, and in order to determine the rate it is necessary to determine the route. Therefore we will have to find out where the station is and over what roads it would pass to the points of destination. And by reference to this plaintiff's exhibit 1, tariff No. 100-A, on page 57, we have routing and application. We determine that the Pecos & Northern Texas Railway Company and the Short Line do not jointly or together agree to quote a through rate from Hereford to Short Line points as indicated. In Note 1, Item 360, which is opposite to this page 57 where the route is quoted, it reads: "Where route number is not shown there are no through rates applicable from the originating line."—I would understand from that that there are no through rates applicable from Hereford, Texas, or any other P. & N. T. point to any point on the Oregon Short Line.



Mr. Hart: Except Amarillo?

A. Excepting none. Amarillo, while it is on the P. & N. T., and also on the F. W. & D. C., or the Fort Worth & Denver City, would, so far as a shipment originating at Amarillo is concerned, not be a P. & N. T. point. The P. & N. T. Company would not in any way enter into the shipment.

Court: Well, the P. & N. T. Company, is that an interstate line?

A. Your Honor, yes, a portion of the A. T. & S. F. Railway Company, or at least that is my understanding. It does not run interstate, but it receives freight handled interstate, and in that way is a part of the interstate.

Court: It is local?

A. It is within the state of Texas.

Q. Now, Mr. Rankin, something has been said here about the application of Item 200, I believe, not applying where there are no differentials. Will you explain that to the court, please?

A. Section No. 1, that is on page 24 of tariff 100-A, Item 200 is, "Governing use of differentials shown in section No. 1, pages 24 to 31 inclusive."

"The differentials shown in section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates as shown in section No. 2 hereof, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69."

I would not understand that paragraph, your Honor, to mean anything except that when routing instructions were provided on any of the pages from 56 to 69 there would be a through rate; when there was no route provided, there would be no through rate. There is no route provided, therefore there is no through rate from Hereford, Texas, or any other P. & N. T. point, to any O. S. L. point.

Q. What is your construction of the second paragraph of Item 200?

A. "Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in section No. 2 are to be applied as indicated."

Q. Well, now, how are they indicated?

A. In section No. 1 we have various differentials to be added to or deducted from these various basing points. They are for application in connection with shipments transported over routes indicated on pages 56 to 69, if I am not mistaken in the page number.

Recess until 2 p. m. '

Q. Now, Mr. Rankin, in your statement here in the Portland Cattle Loan Company, you show the original collection as \$136.50. How was that rate constructed, if you know, to make that \$136.50?

A. Combination over Amarillo, \$20 to Amarillo and \$116.50 Amarillo to Pocatello, using Idaho Falls as the rate basis.

Court: What does that refer to?

Mr. Robbins: Portland Cattle Loan shipment Hereford to Pocatello.

Q. How many cars were in that shipment that the court is asking you about? It is indicated in the statement.

A. 27 cars.

Q. That is 27 from Hereford to Pocatello, and then the one from Hereford to Amarillo?

A. One.

Q. Making the 28?

A. 28 cars, yes.

Q. 27 and one.

Court: You say you make that total \$136.50?

A. Yes, amount collected. That is the amount collected at time of delivery, \$136.50 per car.

Q. Well, now, out of that \$136.50, did you make any refund?

A. Yes, there was a refund made on 27 of the cars, those 27 cars destined to Pocatello.

Q. Explain to the court how that came about?

A. The Portland Cattle Loan Company filed a claim for alleged overcharge with our freight claim department, and it was paid. That overcharge was \$20 per car. It was alleged that that \$20 represents or represented a back haul from Idaho Falls to Pocatello. But, as a matter of fact, we refunded \$20

collected and paid by our company to the P. & N. T. Company. Therefore we paid the P. & N. T. Company the \$20, and also the Portland Feeder Company \$20 on those 27 cars.

Court: \$20 apiece?

A. We paid the Portland Feeder Company in refund on account of the alleged overcharge, and we paid the P. & N. T. Company in interline settlement, which is the customary manner of disbursing of moneys collected for these lines. We hoped to secure credit by charging the various carriers interested, but upon applying to these carriers for authority to charge their companies with the amounts paid on account of the alleged overcharge, it was pointed out to us, the Short Line Company, that we were in error in refunding the amount, and that the correct charge for transportation of the cattle from Hereford to Amarillo was \$26.40, and that there was no through rate from Hereford, Texas, to Pocatello, Idaho; that it was made up of a combination over Amarillo.

Mr. Hart: You are speaking now, if I may interrupt, of something that was done prior to the time that you came into the transaction?

A. I am speaking simply from the records of our company.

Mr. Hart: That is what I am asking.

A. I have no personal knowledge that this ship-

ment moved other than what I have gained from the records.

Court: The \$20 overcharge was an erroneous charge in the first place?

A. No, it was not an erroneous charge. We collected \$20 for the transportation of the shipment to Amarillo.

Court: I mean in the first instance when the charge was made?

A. \$20?

Court: Yes.

A. No, it was insufficient at that time even.

Court: I know. But leaving out the construction, you are giving the rates now, the \$20 was an overcharge in any event?

A. I don't understand it as such.

Mr. Hart: That is the point that I have made. If I may ask the question, perhaps it will get at what Judge Wolverton means, the \$20 collected over the \$116.50. You collected \$136.50 for these cars?

A. Yes, sir.

#### Examination by Mr. Hart.

Q. That was intended at the time of the collection to include \$116.50 for the trip to Idaho Falls and \$20 for the back haul to Pocatello, was it not?



A. I don't understand it that way.

Q. Well, you don't know anything about it, as a matter of fact, do you?

A. Yes.

Q. What do you know, anything more than the records show? You don't mean to say to the court here, do you, Mr. Rankin, that that \$20 was intended at the time of the collection to cover the trip from Hereford to Amarillo?

A. I certainly do.

Q. You do?

A. Yes.

Q. Have you got anything to show that it was so intended?

Mr. Robbins: Well, now, if the court please, he has answered the question. I would like to finish my examination.

Court: What I was trying to get at, there was a charge of \$116.50 from Amarillo to Pocatello, and then they made a charge of \$20 for the back haul from Idaho Falls, and that was paid, and afterwards the shipper came back claiming that \$20 was an overcharge, so that the charge from Hereford to Amarillo was never included in that charge where they claimed the overcharge.

Mr. Hart: That is the point I made to the complaint in this case. I have always said that if we owed anything, it was the balance over and

above what had been finally paid, taking the overcharge into consideration—taking the refund into consideration. The refund, as we claim, was intended to cover this overcharge from Idaho Falls to Pocatello. Then they come back and say that the transportation from Hereford to Amarillo should be collected, which is \$26.40, and they ask us to pay back to them the \$20 they refunded us and also \$6.40. Now, the amounts are not the same. The overcharge is unquestioned, as I understand it, and the point involved in the case is whether or not the Hereford-Amarillo local of \$26.40 is collectible.

Court: Taking their claim, the charge from Hereford to Amarillo was \$26.40?

Mr. Hart: Yes, that is the local rate.

Court: And the rate from Amarillo to Pocatello is \$116.50?

Mr. Hart: Yes.

Court: Now, then, that is what they are claiming now as being the correct charge?

Mr. Hart: Yes, that is their present construction of the tariff.

Court: Now what they collected before, in the first instance, was \$116.50 plus \$20 for the back haul?

Mr. Hart: Yes.

Court: So that is \$136.50 that they collected?

Mr. Hart: Yes.

Court: But they said they were wrong in charging the \$20 back haul, and therefore they paid that back?

Mr. Hart: Yes.

Court: So that now they claim, under this contention, the two items of \$26.40 and \$116.50, that makes \$142.90.

Mr. Hart: That is their present claim of the rates, yes.

Court: Yes. The \$26.40 would be the amount really that they claim now on each car?

Mr. Hart: I so understand it, yes. And I thought that situation had been established by the correspondence that is, by Mr. Reeves and Mr. McNitt's letters, that they recognized the impropriety of exacting the \$20 for the Idaho Falls-Pocatello back haul; but this witness, as I understand, is testifying that that \$20 was never collected for that purpose at all, but intended to cover or apply on the \$26.40 from Hereford to Amarillo.

Court: It is a matter of construction. I would like to hear the witnesses, however, on the matter.

Examination by Mr. Robbins Resumed.

Q. Mr. Rankin, what does the \$20 cover?

A. The \$20 covers or was intended to cover, that portion of the transportation furnished from Hereford, Texas, to Amarillo, Texas.

Mr. Hart: I move to strike that out, because the witness obviously could not have any knowledge of the intention.

Court: It is very obvious to my mind that the witness is laboring under a mistake. Of course, the shipment was made from Hereford to Amarillo, and then to Pocatello, and then on to Idaho Falls. The matter of charge, first charge, was made on the two items, from Amarillo to Pocatello, and then \$20 for back haul. Isn't that right?

Mr. Robbins: Partly so, your Honor.

Q. Now, Mr. Rankin, have you looked into this matter, examined the records back from the inception of this shipment, to see what has been done in regard to these refunds?

A. Yes.

Q. Now is there any explanation you want to make in connection with this \$20 refund covering the amount from Hereford to Amarillo?

A. Yes.

Mr. Hart: I don't think he should make explanations of his idea. We introduced in evidence letters from the Short Line people showing how the refund came to be made, and showing it was this back haul of \$20. It is not right to permit now this witness to say what his idea is gained from perusal of correspondence.

Court: They put him on as an expert.

Mr. Hart: If he has any correspondence or any record which negatives that proof that is shown in the letters of Mr. McNitt and Mr. Reeves, all right; but as an expert I don't think it would be permissible for him to say what his idea is of the correspondence and records.

Court: That would be a matter for the court to interpret. I am inclined to hear this testimony because I want all the light I can get on it. You may explain.

A. My understanding, and the reason for my statement that the amount of \$20 is for payment of that portion of the transportation from Hereford, Texas, to Amarillo, is based on the fact that we paid that amount to the initial carrier for that service, in interline settlement with that carrier.

Q. That you paid to the Pecos & Northern Texas the sum of \$20 per car?

A. Yes, sir.

Q. To cover the haul from Hereford to Amarillo?

A. Yes.

Mr. Hart: When?

A. It will be necessary to refer to the record.

Q. Have you got them there with you?

A. They are in Mr. Wood's deposition.

Q. Well refer to it.

A. The record doesn't seem to be here.



Q. There is one of them, the copy, I guess will do.

A. Well, I wish the original record.

Q. Have you found it?

A. Yes, I have it.

Q. Go ahead. Answer the question.

A. November and December, 1912.

Q. And how much was paid to the Pecos & Northern at that time?

A. \$880.

Q. That is, \$880 paid to the Pecos & Northern Texas Railway Company.

A. Pecos & Northern Texas Railway Company.

Court: I suppose the Pecos & Northern Texas collects for the entire freight to its point of destination?

Mr. Hart: No, it was collected at destination, if your Honor please, at Pocatello.

Court: And then distribution made between the different roads according to their agreement between them as to what proportion each should receive?

Mr. Hart: Yes.

Q. Now, you made a refund there of \$20 a car, covering—or rather, that refund of \$387.70 which you made on January 30, 1915, what did that cover?

A. That covered a supposed overcharge for back

haul from Idaho Falls to Pocatello which did not exist.

Q. Go ahead and explain that a little fuller.

A. As brought out in the testimony we had collected \$136.50 per car for the transportation of those cars destined to Pocatello. That amount represents only the \$20 per car for transportation from Hereford, Texas, to Amarillo, and \$116.50 for transportation from Amarillo to Pocatello. In the filing of the claim and investigation of it, through some error or oversight, it was understood that this \$20 was collected as a back haul from Idaho Falls to Pocatello, and was consequently refunded as an overcharge.

Q. Well, now, \$340 of that was the actual refund, wasn't it and \$47.70 covered interest?

A. Yes, sir.

Q. So that in reality there was \$340 refund made there on January 30, 1915. Now, what did that other refund of \$228, \$200 and \$28 interest, which was made on February 17, 1915, what did that cover?

A. The first refund was on 17 cars, the latter refund was on ten cars and was made up and explained in the same way.

Q. And those shipments were moving from Hereford to Pocatello?

A. Yes.

Q. Now, what were the total charges, then, paid

on account by the Portland Cattle Loan Company? Do you have a memorandum of those things?

A. Yes.

Mr. Hart: Hasn't he testified to that, Mr. Robbins?

Mr. Robbins: It is not very clear.

Mr. Hart: There is no dispute about it, and it has been testified to several times.

Mr. Robbins: I think he ought to explain it here for his Honor. It is not quite clear.

Q. In order to expedite the matter, refer to that memorandum you have there, that you have been using. Will that expedite the matter in any way?

A. Possibly. These columns are not footed.

Q. Have you got a memorandum there that you can refer to quickly, without consuming too much time?

A. Yes.

Q. What was the total amount collected, then, from the Cattle Loan Company?

A. In payment of freight charges, \$6342.30.

Q. And what is the total of those refunds, then?

A. \$615.70.

Q. Well, then, deducting those refunds from the amount paid would leave a balance due there, or a balance actually paid, of \$5726.60?

A. I haven't that calculation, but I presume it would be right.

Q. It would be the difference between \$615.70 and \$6342.30?

A. Yes, sir.

Q. Now, then, on your computation, what were the total charges due?

A. Total charges due?

Mr. Hart: It is all stated on this memorandum of yours, isn't it?

Mr. Robbins: No, that is not footed up.

A. They are not footed. They are per car here, but not footed.

Mr. Hart: It is a mere matter of computation.

A. That is all. \$6623.90.

Q. Then the difference between \$5726.60 and \$6623.90 is the amount that we are claiming here on this Loan case?

A. Yes.

Q. That is \$897.30?

A. Yes.

Q. But in that calculation there is included \$75.70, which was paid in those refunds?

A. Yes.

Q. Which practically does not cover transportation charge? That is a matter of interest?

A. Yes.

Q. Now, then, on the Butte shipment, Hereford

to Butte there were 36 cars in that shipment, were there?

A. There were 16 cars.

Q. No, no. 16, yes, 16 cars from Hereford to Butte. They are the last 16 cars shown on the Cattle Loan statement there. Now, there was no refund made on those cars, was there?

A. No, sir.

Q. And the original collection there, as shown here, is \$164.80?

A. Yes, sir.

Q. The calculation was made just the same as you have already explained, with the exception of from Pocatello to Butte?

A. Yes.

Q. Just tell the court how you made the calculation from Pocatello to Butte—what you based it on.

A. The rate from Hereford to Butte is made similarly to the rate from Hereford to Pocatello, except that a through rate from Amarillo, Texas, to Dillon is used instead of the through rate from Amarillo to Pocatello. And in addition to the rate from point of origin, Hereford to Dillon, the local from Dillon to Butte is added to secure the rate applicable from point of origin to Butte.

Q. Now, Mr. Rankin, you have checked these car numbers and initials against your records there that you have with you, have you?



A. Yes, sir.

Q. You have also checked the routing?

A. Yes, sir.

Q. What routing do you say this took? What was the routing?

A. Shipment from Hereford moved via the P. & N. T. to Amarillo, via the Fort Worth & Denver City to Texline, via the C. & S. Texline to Denver, via the Union Pacific Denver to Granger, and via the Oregon Short Line Granger to destination—Pocatello and Butte.

Q. Now referring to the first cause of action in the Feeder case, there are 36 cars there, moved from Hereford to Monida, your statement shows?

A. Yes.

Q. Now, the calculations would be just the same up to Pocatello, would they, as you have already described from Hereford to Pocatello?

A. Yes, the rate is made in the same way as that rate applicable to Pocatello.

Q. Well, how about the rate from Pocatello to Monida?

A. There is a rate quoted through from Amarillo to Monida. So you take the through rate from Amarillo to Monida plus the local from Amarillo to Hereford.

A. Yes, sir.

Q. Now, you figured that out on here, there is

no use stopping to calculate it, I take it, and your original collection on that movement was \$138.50?

A. \$138.50 per car.

Q. And how is that made up, that \$138.50?

A. The rate as primarily collected simply in the same way as described in connection with those shipments destined to Pocatello—\$20 for transportation of that portion of the movement from Hereford, Texas, to Amarillo, and \$118.50 from Amarillo to Monida.

Q. Then you say here in your statement the correct charge is \$144.90. That is, there was an undercharge of \$6.40?

A. Yes.

Q. How did you arrive at that \$6.40?

A. \$6.40 undercharge is the difference between the \$20, as originally allowed the Pecos & Northern Texas for their proportion of the haul, and the amount as stipulated in this local tariff.

Mr. Robbins: Now. I am not quite clear whether it is necessary to refer to this second cause or not. I understand you practically admitted our allegations on that, Mr. Hart?

Court: They admit that providing their theory of construction is correct. If it proves to be incorrect then that would alter it.

Mr. Robbins: It would not be necessary for me to offer proof on that second cause, then?

Court: I understand that is your position?

Mr. Hart: Yes, your Honor.

Q. Now, what do you say about the routing of this shipment from Hereford to Monida? Would the routing be the same as you have already described?

A. Identically.

Q. Have you checked these car numbers on the exhibit?

A. Yes.

Q. Know them to be correct. Now, on this Monida shipment, what was the payment on account? That is, how much was collected there, the total collection?

A. In payment of freight charges \$4986.

Q. And what was the correct charge as totaled?

A. \$5216.40.

Q. So the difference between \$5216.40, what we claim is the correct charge and \$4986, the amount that was paid on account, would be \$230.40?

A. Yes, sir.

Q. That is what we are asking on the first cause of action?

A. Yes, sir.

Q. And on the second cause of action, what was the payment on account there?

A. For the 21 cars destined Pocatello \$2866.50; on the 11 cars destined American Falls \$1655.50.

Q. That makes a total of \$4522 paid on account, then?

A. Yes.

Q. And the difference, then, between \$5149.20, which we claim is the correct charges, and \$4522, the amount paid on account, or \$627.20, is the amount we are claiming there on the second cause of action?

A. Yes.

Q. Making a total due, on both the first and second causes, of \$857.60, or whatever it figures out there?

A. Yes.

Q. Now, I notice you have a heading here "Freight Bill," "Waybill Reference." Just tell the court what you mean by that heading.

A. In describing the headings, the first "Car Initial & No." is descriptive of the initial and number. The next describes the point of origin of the shipment. The next "Waybill Reference" describes the issuing station, that is, the station issuing the waybill, the station from and to, and the date. The waybill is a document accompanying the shipment from point of origin to destination, passing with the shipment through the different junctions and over the different roads. The next

“Freight Bill” is a document used in giving a receipt to the consignee for any amount paid, and taking his receipt for freight delivered. It is made in duplicate.

Q. Now, is there any further explanation you desire to make to the court at this time?

A. No.

Cross Examination.

Questions by Mr. Hart:

Q. Mr. Rankin, you said you are now a clerk in employ of the auditor's office of the Short Line?

A. Yes, sir.

Q. In charge of the revision of accounts?

A. No; in charge of collection of underpaid accounts.

Q. And you took that position about a year ago?

A. Yes, sir.

Q. And when you took the position you inherited with it all the old undercharge claims?

A. Yes, sir.

Q. And you have been active in the prosecution of this matter since that time?

A. Yes.

Q. You are the man who furnished the information to counsel for the commencement of the proceedings?

A. Yes.



Q. Before going into that work in the auditor's office, you were in the freight accounting department?

A. Yes, sir.

Q. And what particular work were you doing there?

A. I had charge indirectly of station accounts.

Q. What do you mean by indirectly?

A. Well, there was a man appointed as head of a bureau. I was his assistant. In his absence I had charge.

Q. Checking station accounts?

A. Checking station accounts.

Q. And how long were you at that work?

A. Four years.

Q. That is in the receipts division?

A. No. The receipts divisions? I don't understand. There is no such title as that.

Q. You do not have an auditor of freight receipts?

A. No, sir.

Q. And prior to doing that work, what were you doing?

A. Telegraphing on the D. & R. G. and acting as cashier.

Q. So that your experience with rates and with tariffs includes such work as you had as tele-

grapher and station clerk, or station agent, and then in the office checking station receipts, and then looking after the collection of undercharges?

A. Yes, sir.

Q. Now, Mr. Rankin, you testified that this \$20, which was collected in the first instance on all of these shipments, in addition to the \$116.50 rate from Amarillo, you concluded had been collected to cover the transportation up to Amarillo?

A. Yes.

Q. And you came to that conclusion because you found that your company paid to the Pecos & Northern Texas \$20 a car?

A. Yes.

Q. Have you any idea why they made it \$20. The local rate was \$26.40.

A. Yes.

Q. And they could not have been endeavoring to pay the local rate, could they?

A. Yes.

Q. Well, now, I notice on the Abernathy shipments that originated at Abernathy.

A. Yes.

Q. Where the local rate is some \$39.50 to Amarillo I notice there was some \$20 collected there also. Do you think that was intended to cover the local?

A. Yes.

Q. You think somebody made a mistake in calculation?

A. Yes.

Q. And that it was \$20 even that was collected for that purpose?

A. Yes.

Q. Although there is not any tariff authority anywhere for such a charge?

A. There is tariff authority, but it is not applicable in the case.

Q. Well, now, don't you think, as a matter of fact, Mr. Rankin, that the \$20 was paid to the Pecos & Northern under the supposition that that was to be the allowance to that company for its share of the transportation regardless of what the through rate charged the shipper was?

A. No.

Q. You think not?

A. I know not.

Q. Oh, you know? Were you there?

A. No.

Q. Well, when you say you know, you mean you have formed a conclusion to that effect? That is true, isn't it, bearing in mind that your acquaintance with this matter began a year ago?

A. Yes.

Q. You are hardly in a position to say you know anything about it absolutely?

A. Well, only from our records, which are, no doubt, correct.

Q. Yes, and you have told us about those?

A. Yes.

Q. Now, you seem so positive about this transaction, Mr. Rankin, you tell us that you prepared the figures for your counsel to begin this suit, I ask you if it is not true that when this suit against the Portland Cattle Loan Company, was begun, the amount demanded of the Cattle Loan Company, instead of being \$897.50 was \$1437.30?

A. Such might be the case.

Q. Yes; and when you furnished the figures to your counsel, to Mr. Robbins, to commence this suit, you told him that the Cattle Loan Company owed you \$821.60, representing an undercharge at the Texas end, and \$615.70 which you had improperly refunded them for the Idaho end, and you asked him to sue the Portland Cattle Loan Company for \$1437.30? That is a fact, is it not?

Mr. Robbins: Now, Mr. Hart, I didn't prepare the pleadings. They were prepared at Salt Lake.

Mr. Hart: Well, wherever they were prepared. I want to get at this witness's idea.

Q. That is the fact—that is the information?

A. It is my recollection that it was primarily

filed for some other amount. I don't know what the amount was now.

Q. It was covering two amounts, and it aggregated about \$1400, did it not?

A. It was in that neighborhood.

Q. Now, then, when you first prepared this statement of accounts, this statement of alleged undercharges on the Cattle Loan Company shipment, it was not quite in the form in which you have offered it in evidence was it?

A. I did not prepare that statement.

Mr. Hart: Please mark this statement.

Marked "Defendant's Exhibit A."

Q. I show you Defendant's Exhibit A and ask you if it is a copy of the undercharge statement against the Cattle Loan Company as first prepared?

A. It has that appearance.

Q. Yes. Now, then, it is a fact, isn't it, that this statement, Defendant's Exhibit A, which is made up in exactly the same form as the exhibit you have offered a moment ago, this statement shows that the total undercharge claimed from the Cattle Loan Company was \$1127.70? That is a fact, isn't it?

A. Yes.

Q. So that we have first this statement, made up in your office or the office of your company, showing \$1127.70 as the claim?



A. Yes.

Q. And then we have the figures given to the attorneys for the preparation of the suit, showing \$1400 claimed; and now we have your statement offered in evidence showing \$897.60 as the under-charge claim. Someone evidently has been making quite a number of mistakes, hasn't he?

A. It looks that way.

Q. It looks that way indeed. But you are prepared to say that you know what this situation is?

A. Yes.

Q. Take these Abernathy shipments: The differential provided in this tariff, the differential over Amarillo provided in the tariff is some \$9, is it not?

A. \$8.

Q. \$8. The local rate, if the differential could not be applied because there was no through routing, the local rate would be \$39.60, wouldn't it?

A. That is as I recollect it.

Q. Now, your company paid to the Pecos & Northern Texas \$20 a car—neither one of those amounts. You still think, though, that that payment was made on the assumption that that covered a local rate from Abernathy to Amarillo, do you?

A. Yes.

Q. And that is 110 miles or thereabouts?

A. 105 miles.

Q. 105 miles. And exactly the same amount, that is \$20 a car, was collected on the Hereford shipments, and you think that that was intended also to cover the local rate from Hereford to Amarillo?

A. Yes.

Q. Although Hereford is 47 miles from Amarillo?

A. Yes.

Q. Well, somebody had another strange notion of the situation there, I suppose. Now, I ask you these questions, not to annoy you, but to suggest to you in all fairness that the strong probability is—and we are dealing with probabilities because we haven't the facts—the strong probability is that this flat allowance of \$20 was paid to the Pecos & Northern Texas Company under the supposition that that was the division by agreement between the companies?

A. No, sir.

Q. No? All right. Now, you said that the tariff, this tariff, Plaintiff's Exhibit 1, shows no through rate between Hereford and Idaho points on the Short Line? That is your statement?

A. Please state that again?

Q. I say, you say this Exhibit No. 1 shows no

through rate from Hereford to Idaho points on the Short Line?

A. No.

Q. And you say that that is so because on the chart, on page 57, it appears that the Short Line and the Pecos & Northern Texas did not get together on an agreement for a through rate between their two lines? That is the inference you draw from the absence of that writing? That is true, is it?

A. Yes.

Q. Now, then, even though there was no agreement between those two companies, I suppose there would be nothing to interfere with the lines between Amarillo and Pocatello agreeing between themselves that they would apply the Amarillo rate on shipments from Hereford, and do what is known as "absorb" an allowance to the Pecos & Northern Texas so that the shipper might have the benefit of the Amarillo rate, and still the Pecos & Northern Company be paid something by these carriers between Amarillo and Idaho points? There would not be any objection to such an arrangement even though the Pecos & Northern and the Short Line have not gotten together on an agreement for a through rate?

A. If that was incorporated in the tariff, it would be in effect. Otherwise, it would not be.

Q. Yes, all right. If the tariff had a plain statement, so plain that even you and the railroad rate men would recognize it, had that plain statement that shipments originating at Hereford and destined to Short Line points would take the Amarillo rate—had that statement clear beyond shadow of a question—then, if there was no through route specified, it would be apparent that the lines north of Amarillo would have to assume or absorb that, whatever the Pecos & Northern charged them for the local transportation to Amarillo, and the shipper would be entitled to the Amarillo rate?

A. The other carriers would shrink their revenue, or they would not be permitted to receive as much revenue in a case of that kind as in application of the rate.

Q. They would have to take care of this Pecos & Northern transportation charge, whatever it was?

A. Yes.

Q. So that, if the tariff did read that way, even though they did not have a through arrangement, it would still be possible to give the shipper the benefit of the Amarillo rate?

A. Yes.

*.Redirect Examination.*

Q. Mr. Rankin, counsel has asked you about this Portland Cattle Loan Company statement, Defend-

ant's Exhibit A, which totals up \$1127.70. I will ask you to examine that and state whether or not it is the fact that all these claims are contained in that statement. For instance, those 36 cars from Hereford to Monida in the Portland Feeder case are in that statement, aren't they?

A. Yes.

Q. And the 21 cars from Abernathy to Pocatello, the 11 cars from Abernathy to American Falls, are they in there too?

A. No.

Q. Well, the Monida shipment was made by the Feeder Company, wasn't it?

A. Yes.

Q. That is the Loan statement you have got there, isn't it?

A. Yes.

Q. So that mistake comes about by putting some of the Feeder shipments in the Loan statement, don't it?

A. Yes.

Mr. Hart: That is Mr. Robbins' idea of the matter. You are leading the witness.

Mr. Robbins: Examine it, Mr. Hart, and see if you don't agree with me at once.

Mr. Hart: Let me ask, then, this statement was prepared considerably before the time of the commencement of the law suit, was it not?



A. Yes.

Excused.

G. M. Velguth, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Robbins:

What is your business, Mr. Velguth?

A. I am assistant chief clerk in the car service department of the O.-W. R. & N. Company.

Q. At Portland?

A. Yes, sir.

Q. Now, I will ask you if you checked the size of these cars here at my request and made a memorandum of the size of those different cars?

A. I did.

Q. Tell the court where you checked them and how you checked them; that is, not in detail, but where did you get your information?

A. I got my information from the Railway Equipment Guide that lists the dimensions of cars owned by lines.

Mr. Robbins: Counsel admits these were 36 ft. 6 inch cars. That is what we were going to prove by this witness, so there is no use taking any further time with that.

Mr. Hart: Yes.

Court: Very well.

Excused.

Mr. Robbins: Now, if the court pleases, that is our case, with the exception of those depositions that are floating around the town some place. We think it is necessary to have those depositions in this case, and I have two men out looking for them. They are supposed to be here in town some place, but I have no assurance as to when they will locate them. We feel those depositions are important and material in our case. We are willing for counsel to put on his testimony, such as he wants, with the understanding that we can read those into the record later.

Mr. Hart: We have no more testimony. Mr. Lothrop's testimony, taken out of order, and Mr. Anderson's examination while he was on the stand for the plaintiff constitutes our case.

Mr. Robbins: Are you willing, Mr. Hart, that we can read those depositions in later when they are found?

Mr. Hart: Why, of course, I have no objection to whatever course the court sees fit to pursue in reference to them.

Court: What do those depositions relate to?

Mr. Robbins: They relate to the origin of the shipments and the original documents, as I understand.

Court: The shipment is conceded.

Mr. Robbins: Yes, that is true in a way, your honor, but as I understand it—I have not seen those depositions, but as I am informed, the original shipping documents are set forth in them, showing the consignor and all these different things which of course are practically admitted. If counsel is not going to put in any more testimony, I would like to call Mr. French for a moment if I may.

Court: Very well.

S. J. H. French, recalled for the plaintiff.

Direct Examination.

Questions by Mr. Robbins:

Mr. French, you have heard the testimony here in regard to Item 200 not applying where there is no differential mentioned there?

Court: Isn't this matter that this witness has gone over before?

Mr. Robbins: He didn't make it as clear—I want to hear what his explanation is of their new matter that they have injected into the case.

Mr. Hart: I examined Mr. French exhaustively on that subject, brought out what my theory was with Mr. French, so he could have a chance and you could have a chance.

Mr. Robbins: I know; but since then you have put some witnesses on who have taken an entirely

different turn in the matter. I want to know what his explanation is.

A. Well, Item 200, page 24, of this Joint Live Stock Tariff No. 100-A refers to the application of the differentials and the routing where those differentials are indicated. Now, I don't think it is clearly understood as to what the differentials are. A differential is an arbitrary rate or a lower rate than a local rate, and used as a factor for making a through rate. Now, if it was the intention to apply the Amarillo rate through from Hereford via all lines party to this tariff, they would have published the through rate to Hereford.

Mr. Hart: I think it is not right that the witness should be allowed to argue the case and argue as to his idea of the tariff at such length. We have already taken a good deal of testimony on both sides, and Mr. Lothrop is gone—I am not in shape to make a counter-argument. The court has been advised as to the tariffs. It does not seem to me quite fair to permit Mr. French to now engage in a new argument as to purely his idea of what the carriers might do if they wanted to change the situation.

Court: He is trying to explain why the matter stands as it does now. I will hear the testimony.

A. Consequently, it was necessary to show these differentials as they have shown them in part 1 of the tariff. But that is only a section or a part of

this tariff, which cannot be used in and of itself, except in conjunction with the rates provided in section 2 of the tariff. Now, to refer to these differentials, as also the diagram on page 57, there are through rates from Pecos & Northern Texas points to Canadian Pacific points, to C. B. & Q. points, to C. M. & St. P. points, and to all those points where the numerals are shown in the diagram on that page. Consequently, the rates as authorized by that section would apply in conjunction with those lines or to points on those lines. But there were some lines, such as the Oregon Short Line in this particular routing, or take the lines just above, the Kansas City, Mexican & Orient there are blank spaces there to C. B. & Q. points, and C. St. P. M. & O. points and Great Northern points, and to numerous other points. Now, if you construe this tariff to apply the Amarillo rate from Hereford to Oregon Short Line points, then you make void every numeral on this diagram, page 57, because the blank spaces, then, would indicate nothing.

Court: Tell me what those numerals represent.

A. Those numerals represent the routing by the respective lines party to the tariff. For instance, this Pecos & Northern Railroad shows through rates to Northern Pacific points, and 78 is the route. Now, you turn to route 78 on page 62, and you find here the routing by Amarillo, Texas, Fort Worth &



Denver City. See route 28. Now turn back to route 28, and it says, "Denver, Colorado, C. B. & Q. R. R., Billings, Mont." And there are also other routes. Pecos & Northern Texas Railway to points on the C. M. & P. S. Railway, Route 71, which shows on page 62, via "Amarillo, Texas, So. K. Ry. of Tex.—A. T. & S. F. Ry. See Route 6." And Route 6 on page 58 says, "Via Kansas City, Mo., C. B. & Q. R. R., Council Bluffs, Ia., C. M. & St. P. Ry." etc. Now, the C. M. & St. P. apparently was agreeable to through rates from Hereford by that line. So was the C. B. & Q. So were the other lines as specified by those numerals on that diagram on page 57. But the Oregon Short Line was not agreeable to that, because there is a blank space shown, and you cannot take section 1 of the tariff without considering section 2 of the tariff, and the application, which is the key to any tariff printed, which by Item 360 plainly states that "Where route number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in section No. 3." Now, that is my explanation of the differential.

#### Cross Examination.

Questions by Mr. Hart:

Have you given a good deal of study to it, Mr. French?

A. I have, to this tariff, Mr. Hart.

Q. It is a little bit involved, is it not?

A. It is.

Q. If you were engaged in constructing a tariff, I think you could probably make it quite considerably clearer?

A. Yes. And this tariff, having been printed five years ago, I should say it would have been printed clearer, or rather made clearer, if it were published today or recently.

Q. Yes. The absence of a route number there in that chart is in direct conflict with the explicit statement in section 1, that where no differentials are stated, the flat rate from the base point is to be applied?

A. If it were not for the clause "As indicated."

Q. Well, now, that is just the point, and I think that is very important. Well, it is this word "as indicated" that to your mind would cause one to refer to section 3?

A. In section 3 are miscellaneous rates—section 2.

Q. Section 3 is the routing, isn't it?

A. No, section 3, Mr. Hart, is the rates to miscellaneous points.

Q. Oh, no, section 3 is the routing and application.

A. No, here is section 3, you see. Section 3 is miscellaneous rates.

Q. All right, perhaps I am wrong.

A. Now, the application is on page 56, and the chart is on page 57.

Q. Well, let us get back to that again, then. What I want to get at is, that there is an apparent conflict between the failure to have a route number there evidencing any through rates, there is an apparent conflict between that and the earlier parts of the tariff, which apparently state the Amarillo rate from Hereford, or at least there would be such conflict, in your judgment, if it were not for the fact that the words—the Amarillo rates are to be applied “as indicated”—the words “as indicated” would mean to your mind that the indication was as shown on pages 56 to 69 of the tariff?

A. Yes, sir.

Q. Well, now, as a matter of fact, even though the Short Line and the Pecos & Northern had not undertaken to agree on through rates, it would be entirely possible for the carriers from Amarillo north to apply the Amarillo rate to Hereford, and make their own settlement with the Pecos & Northern Texas?

A. But that should show in the tariff. You see, you have got a blank space in your routing in your tariff there to O. S. L. points.

Q. Yes, but we are presuming that there is no arrangement between the Pecos & Northern and

Oregon Short Line—they haven't any dealings with one another, so far as through rates are concerned?

A. Yes.

Q. But, so far as shippers are concerned, the Oregon Short Line, and the Union Pacific, and the other lines from Amarillo north could properly say to the shipper, "We will make you a rate of \$116.50—the Amarillo rate. Of course, we will have to make some settlement with the Pecos & Northern covering the transportation service they perform, but, so far as the shipper is concerned, we will give you \$116.50"?

A. But you couldn't have that rate without it was published and lawfully filed with the commission, Mr. Hart.

Q. But if they stated in the tariff that the Hereford rate—that the Amarillo rate applied to Hereford?

A. Yes; if they stated in the tariff.

Q. Yes. Then the shipper would be entitled to it, even though there was no through rate indicated?

A. Oh, if it were stated in the tariff, I will concede that.

Q. Yes.

A. But it is not stated in the tariff.

Q. All right. Let me ask you this: Supposing this explanatory note preceding section 1 read this wise: "Where no differentials are shown the Amarillo rates as shown in section 2 are to be applied,"

the words "as indicated" being left out—supposing they were left out, and there was just the flat statement that where no differentials were shown in this section 1, then the Amarillo rate was to be applied?

A. Well, then, I could not reconcile that note with the application on page 56 of the tariff and the key or chart on page 57.

Q. There would be a conflict?

A. There would be a conflict there.

Q. And there being a conflict or ambiguity, it would be perfectly proper to give the shipper the benefit of the doubt and the lower rate?

A. Well, I cannot quite concede that there is a conflict in the tariff as it applies now.

Q. I know, you say the words "as indicated" take it up?

A. "As indicated" meets the doubt—it qualifies the provision of the first section of the tariff. It is merely a preface to the first section of the tariff. Then you take the second section of the tariff, which shows your rate from Amarillo to these Oregon Short Line points.

Q. Well, then, Mr. French, why do you think it was thought necessary, when they were preparing this language for section 1, and they were talking about stations which had a differential over Amarillo, why do you suppose it was necessary to say that those differentials could be enjoyed, or were



to be used, in making through rates where application and routing is provided on pages 56 to 69?

A. Because the C. M. & St. P. and the C. B. & Q. and the D. & R. G. were agreeable to it, and the rates there are provided by the numerals on page 57

Q. All right. Then if it was necessary to make that reference when you were talking about stations which had a differential which did not take the Amarillo rate—if it was necessary to make that reference concerning those stations, why wasn't it equally necessary to make that reference when you were talking about stations which took the Amarillo rate, which did not have a differential?

A. Because, Mr. Hart, some of the lines—the C. B. & Q., for instance, and the C. M. & St. P. will apply the Amarillo rate from Hereford; they will also apply the \$8.80 differential, to make the through rate to points on the C. M. & St. P. from Abernathy, because there is routing on the chart on page 57 by those lines. But the Oregon Short Line will not join in the application of the Amarillo rate from Hereford, because it expressly provides, on page 57 in the chart, that there is no routing provided there.

Q. Yes, but when it expressly states in this tariff that the rates from the Amarillo group are a certain figure, and that Hereford is in that Amarillo group, and then says that those rates are to be applied as indicated, you think those words “as

indicated" should send a man elsewhere in the tariff to find out whether they are there or not?

A. I certainly do, because, Mr. Hart, if a shipment moved by the C. M. & St. P. to Butte, say, or to some point on that line, the \$125 rate the Amarillo rate to Butte, would apply through from Hereford by the C. M. & St. P., and from Abernathy the \$8.80 rate, or the arbitrary up to Amarillo, would apply from Abernathy through, plus the \$125 rate to Butte. But the Hereford rate is not authorized through, or rather the Amarillo rate is not authorized through from Hereford via the Oregon Short Line, and will not apply to points on that line.

Q. You get back to the one proposition that, because the words "as indicated" follow there, it is necessary then to consult the rest of the tariff?

A. In conjunction with the application on page 56, and the same—practically the same rule in the preface to division 2, or section 2 of the tariff.

Q. Well, that refers you right back to section 1, to this same item, does it not?

A. The two work together, which, in conjunction with the application on page 56, are to be used, and the application on page 56 is very specific. It says that the rates will not apply where there is no routing and no rating provided.

Q. Yes, so that if we had that alone we would have no trouble. If we had that statement alone, we would understand it clearly, if that stood alone?

A. But you have got routings and you have got through rates to points where they are authorized, but not to O. S. L. points.

Q. We get back right to the same proposition, that if there was a flat rate provided there, and the explicit statement that the Amarillo rate was to be applied from Hereford, that would govern, even though there wasn't any route number listed?

A. If it was the intention of all lines to join in the through rate from Hereford, it would have said the Amarillo rate applies through from Hereford; but three-quarters of the lines, or the majority of the lines in that tariff apparently were agreeable to the Amarillo rate through from Hereford; but the other lines where, the blank spaces are shown, were not agreeable, therefore they had to provide, by application in section 1, of the tariff, certain differentials.

Q. You are giving us your idea of the intention of the framer of this tariff, but you will concede—

A. And it is as the tariff reads, Mr. Hart.

Q. Yes, but you will concede, I presume, that any one might readily construe it in the manner I have been contending for here? That is a probable construction?

A. Well, if you were general freight agent of the Oregon Short Line, you would not so construe it. You would hate to have the interstate commerce

inspector drop down on you, and say "What is your authority for that rate?"

Q. Didn't the general freight agent of the Oregon Short Line, Mr. J. A. Reeves, so construe it?

A. Not personally, sir.

Q. The letter was addressed to him personally.

A. There are numerous clerks that will sign the name of the general freight agent when he has not seen the communication.

Q. You are indulging in pure speculation, Mr. French, when you say that?

A. That is true.

Q. The fact is Mr. Reeves, general freight agent, was addressed personally on this, and that subsequently to that letter and to a reference to this tariff made thus to him, a refund was made which recognized that Hereford-Amarillo proposition?

A. But it was a mistake, Mr. Hart, under that tariff.

Q. That is your idea?

A. Yes, and I think the tariff shows for itself that that was a mistake.

Q. In other words, you think it would not be safe for any shipper to undertake to find out what the rate is, unless he read the tariff from cover to cover? Is that the fact?

A. You know about the tariffs—

Q. Is that the fact, Mr. French?



A. The first thing a shipper must do is to turn to the application of the tariff.

Q. I ask you if it is a fact that in getting at the rate the shipper is not warranted in resting when he finds his combination and his rate, but he must read the entire tariff to see whether there is some other application or some other limitation?

A. The law charges the shipper with knowledge of the rate.

Q. Yes, you have produced here, as your evidence of this local rate from Hereford to Amarillo and Abernathy to Amarillo, you have produced certain sheets which were taken from the tariffs. Have you given us the tariffs so that we may know whether or not there are any limitations, or exceptions, or provisions in the rest of those tariffs which limit, or change, or alter in any way that local rate?

A. Well, we have extracts of the tariff that was in operation at the time from the Interstate Commerce Commission, and certified to.

Q. Yes, well now, supposing we got an extract of section 1 and section 2 from this exhibit 1, we could show the rate clearly without the limitation that you are contending for.

A. Well, now, you know that between points locally in Texas there is a state commissioner, and that those mileage rates between those two points are the rates. I think you will concede that \$39.60



from Abernathy and \$26.40 from Hereford are the local rates to Amarillo.

Q. I don't know anything about the Texas rates.

A. Well, you cannot controvert them.

Q. I am only trying to make it clear that there is, to say the least, a very great conflict and ambiguity in this tariff.

A. Well, I think I have explained the differentiating feature in that tariff in connection with those differentials, and that is, that where the rates are authorized through to points on the lines party to that tariff, the diagram on page 57 plainly shows it, and the rates and all the junction points, and where the rates are not shown there is a blank space, and there are almost as many blank spaces in the tariff as there are numerals.

Q. That is not quite accurate; but at least it is quite clear, in the use of its differentials, you are given specific reference to the chart and to the routing?

A. Yes.

Q. And when you are looking for the rates from stations which take no differentials, you are given no such reference?

A. If I were to construe the tariff the way you do, I would void the chart on page 57 of the tariff, which you cannot do lawfully.

Q. I don't see that. That is not quite clear to

A. Oh, this particular tariff, no, sir; no.

Q. Now, Mr. French, why do you not apply the differentials to Abernathy, instead of the \$39.60 rate?

A. Because, sir, Abernathy is a point on the Pecos & Northern Texas Railroad, and there is no routing provided on page 57 from points on the Pecos & Northern Texas Railroad to points on the Oregon Short Line; consequently the only basis would be the local rate of \$39.60 from Abernathy to Amarillo plus the \$116.50 rate to Pocatello, \$118.50 to Monida, or \$125 rate to Dillon.

Court: I see your position now.

Excused.

Court: Is that all the evidence you have except those depositions?

Mr. Robbins: Yes, except the depositions.

Court: I can adjourn this case until some day next week, and you can get those depositions here in the meantime. I doubt very much whether you have much to show in your depositions.

Mr. Robbins: Well, I don't know, myself, your honor, until I see them.

Adjourned until Friday, April 27, at which time a further adjournment was taken to May 14, 1917.

Portland, Oregon, May 14, 1917. 2 P. M.

Mr. Robbins: If the court pleases, in these two

cases of the *O. S. L. v. Portland Cattle Loan and Cattle Feeder Companies*, as your honor knows, we stipulated to take depositions at Amarillo. Now, our information is that those depositions were taken, but we have been unable to locate them, and I have entered into a verbal stipulation with Mr. Hart that we may read the copies of these depositions; that is, not the copy, but they were rewritten, the original depositions which were taken at Amarillo. But I find that a number of the original exhibits were attached to those depositions, so I will be unable to produce them at this time. However, we desire to offer in evidence these depositions as they are here today.

The first deposition I desire to offer is in the Feeder case.

Counsel has suggested that it is a waste of time for us to read these. Your honor will probably want to refer to them and read them anyway; and I think it would be much better, probably, if we would not take up the time to read them.

Court: Well, introduce them.

Mr. Robbins: We will offer in evidence, then, depositions in the Portland Feeder case, starting out with E. M. Jones, and the rest of these that are fastened together. And also in the Portland Cattle Loan case.

Now, I notice an exhibit attached to each one

of these, which I take it is the record of the feed yard man down there. We would like to offer those in evidence. I understand they are merely marked for identification.

Mr. Hart: Mr. Robbins correctly states our understanding that these may be treated as if they were the transcripts of the testimony originally taken. But, of course, with that concession, I want to reserve the right to make all the objections which are noted in the depositions themselves.

Court: How about those exhibits?

Mr. Robbins: Well, of course, if those exhibits come, your honor, we would like to offer them in evidence. But I firmly believe that the man who took those depositions did not extend them—what has become of them I don't know—because myself, as well as Mr. Hart's people, have tried to locate them. But I am not through yet—I am going to hunt this thing up, and run it down, because I am not satisfied with the treatment I got at Amarillo. If necessary, I am going to send a man down there to see what became of these depositions. If I discover them at a reasonable time, I would like the privilege of offering them in this case—that is, the exhibits out of those.

Court: Do you object to that if they get here in time?

Mr. Hart: Of course, I am on the slow side of

the case, your honor. I don't care how much time he takes. I do want to take advantage of any failure of proof which Mr. Robbins may encounter, because, as I said before, these are cases in which the claims made are inequitable as between the contracting parties. The necessity for bringing the suits arose out of the obligation to enforce the Interstate Commerce law as the Short Line Company conceives that obligation. At the same time, from the fact that so much actual injustice results from any such late enforcement of their alleged construction of the tariffs, I would be remiss in my duty to my client if I did not take advantage of every means possible to defeat the claims.

Court: You want to submit the case at this time?

Mr. Hart: Yes.

Court: Well, you may submit the case, and if the exhibits come, you can apply to the court for leave to introduce those exhibits, and of course the other party will have notice of that, and you can test that out at that time.

Mr. Robbins: I intend to try to get them. In fact, I am trying to do it now. That is all we have.

Mr. Hart: That is all we have.

---

And afterwards, to-wit: on the.....day of  
....., 1917, there was duly filed in said



court a stipulation in words and figures as follows,  
to-wit:

STIPULATION.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

No. 7232.

PLAINTIFF'S EXHIBIT No. 1.

Only two Supplements to this Tariff will be in  
effect at any time.

I. C. C. No. 265.

Cancels I. C. C. No. 214.

JOINT LIVE STOCK TARIFF NO. 100-A.

Cancels Joint Live Stock Tariff No. 100

Naming Local, Joint and Proportional Rates  
on

RANGE CATTLE, ALSO HORSES

When Part of a Shipment of Range Cattle and Accompanying Same  
From Stations in  
Arizona, Colorado, Kansas, New Mexico, Oklahoma and Texas,

Also Stations in the Republic of Mexico

To Stations in

Colorado, Iowa, Idaho, Montana, Nebraska, North  
Dakota, South Dakota, Washington and Wyoming.

Also Stations in the Dominion of Canada.

Issued March 26, 1912. Effective May 2, 1912.

Issued by W. A. Poteet, Agent,

Kansas City, Mo.

J. D. H. Co.—3,500

### Page 4 of the Exhibit

#### Index to Points of Origin

See Item No. 5.

Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*
Abernathy	Tex.		P. & N. T. Ry.				120	
*	*	*	*	*	*	*	*	*
Amarillo	Tex.		S. K. Ry. of T.				186	
*	*	*	*	*	*	*	*	*

### Page 5 of the Exhibit

#### Index to Points of Origin—Con.

*	*	*	*	*	*	*	*	*
Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*
Hereford	Tex.		P. & N. T. Ry.				98, *255	
*	*	*	*	*	*	*	*	*

\*Refers to Item Numbers of Miscellaneous Rates.

## Page 9 of the Exhibit

## Index to Points of Destination

See Item No. 5.

Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*

---

## Page 11 of the Exhibit

## Index to Points of Destination—Con.

Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*
Dillon	Mont.		O. S. L.				2060	
*	*	*	*	*	*	*	*	*

---

## Page 12 of the Exhibit

## Index to Points of Destination—Con.

Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*
Idaho Falls	Ida		O. S. L.				2050	
*	*	*	*	*	*	*	*	*

---

## Page 14 of the Exhibit

## Index to Points of Destination—Con.

Stations			Roads			Index No.		
*	*	*	*	*	*	*	*	*
Monida	Mont.		O. S. L.				2055	
*	*	*	*	*	*	*	*	*

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## Page 18 of the Exhibit.

Item	Intermediate Application
No.	

*Application of Rates from and to Intermediate Points.*

Will not apply in connection with rates shown in  
5 Section 3, pages 52 to 55 inc.

To a point of destination not named in Section 2 of this Tariff but which is directly between two points to which specific rates are named, in such section, the rate to apply will be the rate to the more distant of the two points between which the intermediate point is located; routing to be the same as applies to the more distant point.

From a point of origin not named in Section No. 1 of this Tariff but which is directly between two points from which specific rates are named in such section, the rate to apply will be the rate from the more distant of the two points between which the intermediate point is located; routing to be the same as applies from the more distant point.

\* \* \* \* \*

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Page 24 of the Exhibit

Section No. 1.

Item 200—Governing use of differentials shown in  
Section No. 1, pages 24-31 inclusive.

The differentials shown in Section No. 1 are to be added to or deducted from the Amarillo, El Paso

or Deming rates as shown in Section No. 2 hereof, pages 32 to 51 inclusive, to arrive at the through rate, where application and routing is provided on pages 56 to 69.

Where no differentials are shown, the Amarillo or El Paso-Deming rates as shown in Section No. 2 are to be applied as indicated.

---

Page 26 of the Exhibit

Section No. 1.

Basis from Points of Origin for Rates on Range  
Cattle, Also Horses (See Items 10 and 200)

In Dollars and Cents per 36 $\frac{1}{2}$  Foot Car



## THE PECOS RIVER RAILROAD CO.

Index No.	From Stations.	Amarillo, Add. Deduct.	Index No.	From Stations.	Amarillo, Add. Deduct.
79	Angeles, Tex.	\$25.00 . . . .	83	Arno, Tex.	\$28.50 . . . .
80	Orla, "	25.00 . . . .	84	Patrole, "	28.50 . . . .
81	Riverton, "	25.00 . . . .	85	Pecos, "	28.50 . . . .
82	Dixieland, "	28.50 . . . .			

## THE PECOS &amp; NORTHERN TEXAS RY. CO.

Index No.	From Stations.	Rate Basis.	Index No.	From Stations.	Amarillo, Add. Deduct.
90	Zita, Tex.	Amarillo.	125	Burris, Tex.	\$15.40 . . . .
91	Haney, "	" "	126	Posey, "	15.40 . . . .
92	Canyon, "	" "	127	Slayton, "	16.50 . . . .
93	Canyon Jct., "	" "	128	Slayton Jct. "	17.60 . . . .
94	Lester, "	" "	(R)129	Southland, "	17.60 . . . .
95	Umbarger, "	" "	(R)130	Buenos, "	17.60 . . . .
96	Dawn, "	" "	(R)131	Dugger, "	18.70 . . . .
97	Joel, "	" "	(R)132	Post St Yds., "	18.70 . . . .
98	Hereford, "	" "	(R)133	Post, "	18.70 . . . .
99	Summerfield, "	" "	(R)134	Augustus, "	19.80 . . . .
100	Black, "	" "	(R)135	Justiceburg, "	20.90 . . . .
101	Friona, "	" "	(R)136	Justiceburg	
102	Parmerton, "	" "		Stk Yds., "	20.90 . . . .
103	Bovina, "	" "	(R)137	Sand Creek	
104	Wilsey, "	" "		Spur, "	22.00 . . . .
Index No.	From Stations.	Amarillo, Add. Deduct.	(R)138	Eppler, "	22.00 . . . .
105	Farwell, N. M.	\$ 2.75 . . . .	(R)139	Fullerville, "	23.10 . . . .
Index No.	From Stations.	Rate Basis.	(R)140	Dermott, "	23.10 . . . .
106	Hutson, Tex.	Amarillo.	(R)141	Brand, "	24.20 . . . .
107	Ralph, "	" "	(R)142	Snyder, "	24.20 . . . .
108	Happy, "	" "	(R)143	Chorn, "	25.00 . . . .
109	Kaffir, "	" "	(R)144	Hermleigh, "	25.00 . . . .
110	Tulia, "	" "	(R)145	Pyron, "	25.00 . . . .
111	Eunice, "	" "	(R)146	Bernecker, "	25.00 . . . .
112	Kress, "	" "	(R)147	Gannon, "	25.00 . . . .
113	Finney, "	" "	(R)148	Sweetwater	
114	Plainview, "	" "		Jct., "	25.00 . . . .
Index No.	From Stations.	Amarillo, Add. Deduct.	(R)149	Sweetwater, "	25.00 . . . .
115	Plainview Jct., Tex.	\$ 4.40 . . . .	(R)150	Lider, "	4.40 . . . .
116	Ferguson, "	4.40 . . . .	(R)151	Aiken, "	6.60 . . . .
117	Hale Center, "	4.40 . . . .	152	Lockney, "	8.00 . . . .
118	Swastika, "	4.40 . . . .	153	Muncy, "	10.20 . . . .
119	Aley, "	8.80 . . . .	154	Floydada, "	11.00 . . . .
120	Abernathy, "	8.80 . . . .	155	Lofton, "	18.70 . . . .
121	Monroe, "	14.30 . . . .	156	Wilson, "	18.70 . . . .
122	Lubbock St. Yds., "	14.30 . . . .	157	Dune, "	19.80 . . . .
123	Lubbock Jct., "	14.30 . . . .	158	Tahoka, "	19.80 . . . .
124	Lubbock, "	14.30 . . . .	159	Skeen, "	21.00 . . . .
			160	O'Donnell, "	22.10 . . . .
			161	Hindman, "	23.20 . . . .
			162	Arvana, "	23.20 . . . .
			163	Lamesa, "	23.20 . . . .

(R) Indicates reduced rates.

## Page 32 of the Exhibit

## Section No. 2.

Rates from Amarillo, El Paso-Deming Groups.  
Item 205.

The rates shown in Section No. 2, in columns headed "Amarillo" and "El Paso-Deming," are to be applied from stations shown in Section No. 1, as taking Amarillo or El Paso-Deming Rate Basis or same are to be used as a basis for arriving at through rates from stations shown in Section No. 1 as taking differentials OVER or UNDER Amarillo or El Paso-Deming rates, where application and routing is provided on pages 56 to 69 inc. from such point of origin to the destination station.

See also item 200, page 24.

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Page 50 of the Exhibit

## Section No. 2.

Rates on Range Cattle, Also Horses (See Item 10  
also 205, page 32.) In Dollars and Cents  
Per 36½ Foot Car.

## NORTHERN PACIFIC RAILWAY—Continued.

Index No.	To Stations.	From Amarillo Group.		From El Paso-Deming Group.	
		In Lots of Less Than 10 Cars.	In Lots of 10 Cars or More.	In Lots of Less Than 10 Cars.	In Lots of 10 Cars or More.
2013	Whitehall,	Mont. \$130.00	\$125.00	\$158.50	\$153.50
2014	Twin Bridges,	" 130.00	125.00	158.50	153.50
2015	Sheridan,	" 130.00	125.00	158.50	153.50
2016	Alder,	" 130.00	125.00	158.50	153.50
2017	Toston,	" 130.00	125.00	158.50	153.50
2018	Townsend,	" 130.00	125.00	158.50	153.50
2019	Helena,	" 130.00	125.00	158.50	153.50
2019-A	Willow Creek,	" 130.00	125.00	158.50	153.50
2019-B	*Sappington,	" 130.00	125.00	158.50	153.50
2019-C	Cardwell,	" 130.00	125.00	158.50	153.50
2019-D	Deer Lodge,	" 135.00	130.00	163.50	158.50
2019-E	*Kohrs,	" 135.00	130.00	163.50	158.50
2019-F	Garrison,	" 135.00	130.00	163.50	158.50
2020	Drummond,	" 135.00	130.00	163.50	158.50
2021	Missoula,	" 142.00	137.00	170.50	165.50

## OREGON SHORT LINE R. R.

Index No.	To Stations.	From Amarillo Group.		From El Paso-Deming Group.	
		In Lots of Less Than 10 Cars.	In Lots of 10 Cars or More.	In Lots of Less Than 10 Cars.	In Lots of 10 Cars or More.
2050	Idaho Falls, Ida.	\$121.50	\$116.50	\$150.00	\$145.00
2051	Market Lake,	" 121.50	116.50	150.00	145.00
2052	*Camas,	" 121.50	116.50	150.00	145.00
2053	Dubois,	" 121.50	116.50	150.00	145.00
2054	Spencer,	" 123.50	118.50	152.00	147.00
2055	Monida,	Mont. 123.50	118.50	152.00	147.00
2056	Lima,	" 126.00	121.00	154.50	149.50
2057	Red Rock,	" 126.00	121.00	154.50	149.50
2058	*Barratts,	" 130.00	125.00	158.50	153.50
2059	*Dalys,	" 130.00	125.00	158.50	153.50
2060	Dillon,	" 130.00	125.00	158.50	153.50

## UNION PACIFIC R. R.

Index No.	To Stations.	From Groups		Index No.	To Stations.	From Groups	
		Amarillo.	El Paso-Deming.			Amarillo.	El Paso-Deming.
2065	Cheyenne, Wyo.	\$ 75.00	\$103.50	2079	*Slade, Neb.	.....	\$118.50
2066	Egbert, "	75.00	103.50	2080	*Dexter, "	.....	118.50
2067	Pine Bluffs, "	75.00	103.50	2081	Sutherland, "	.....	118.50
2068	Rawlins, "	† 93.50	118.50	2082	*O'Fallons, "	.....	118.50
2069	Rock Springs, "	118.50	142.00	2083	Hershey, "	.....	118.50
2070	*Barton, Neb.	.....	118.50	2084	*Nichols, "	.....	118.50
2071	Big Springs, "	.....	118.50	2085	Birdwood, "	.....	118.50
2072	*Megeath, "	.....	118.50	2086	*Pallas, "	.....	118.50
2073	Brule, "	.....	118.50	2087	North Platte, "	.....	118.50
2074	*Plano, "	.....	118.50	2088	*Gannett, "	.....	118.50
2075	Ogallala, "	.....	118.50	2089	*Keith, "	.....	118.50
2076	*Roscoe, "	.....	118.50	2090	Maxwell, "	.....	118.50
2077	*Korty, "	.....	118.50	2091	*Hindry, "	.....	118.50
2078	Paxton, "	.....	118.50	2092	Brady Island, "	.....	118.50

\*No agent. Freight must be prepaid. †Indicates advanced rates.

## Page 50 of the Exhibit (Continued)

†From Haney, Tex., Index No. 91 and Canyon, Tex., Index No. 92 and from stations Texline, Tex., Index No. 375 to Estelline, Index No. 408, inclusive, rate will be \$88.50 per 36½ foot car.

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## Page 56 of the Exhibit

## Application of Rates

Where routing is shown in this Tariff, it is that ordinarily and customarily to be used, and should be strictly observed by Agents. If, from any cause shipments are routed by carriers via junction points other than those designated, but over the lines of carriers parties to this Tariff, the rate published herein will apply.

NOTE.—Where application of any rate is limited to route via certain carriers, this provision is not intended to authorize application of such rate via or in connection with a competing route or carrier, nor does it cover cases where shippers route shipments contrary to provisions of Tariff.

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Rates provided herein from points of origin shown in Section No. 1 to points of destination shown in Section No. 2, will apply only via the routes indicated in chart on page 57, except as provided in Item 350.

NOTE 1.—Where Route Number is not 360 shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in Section No. 3.

(See also Item 350.)

NOTE 2.—The insertion of a route number is not to be construed as indicating that rates named will apply from all points on the originating line to all points on the destination line via any or all intermediate lines. The data shown on pages 58 to 69 inclusive opposite the route number indicated specifically describes the points of origin, the routes and the points of destination.



PAGE 57 OF THE EXHIBIT

**Routing and Application.** Chart of Routes 1 to 300 Inc., pages 58 to 69 Inc.

	W. S. & S. Ry.	8	72																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																															
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STIPULATION.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

No. 7232.

The parties stipulate that the foregoing sheets numbered 2 to 16 inclusive and described as pages 1, 4, 5, 9, 11, 12, 14, 18, 24, 26, 32, 50, 56 and 57 of Plaintiff's Exhibit 1 in this action are true and correct excerpts from Plaintiff's Exhibit 1. The parties further stipulate that said excerpts contain all of the said Exhibit 1 applicable to the transportation of the shipments described in the complaint in this action and necessary for the determination of the duly filed and published tariff rate properly to be charged for said shipments.

Dated November 23 1917.

W. A. Robbins,

Attorney for Plaintiff.

Carey & Kerr,

Charles A. Hart,

Attorneys for Defendant.

## STIPULATION.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

No. 7232.

The parties hereto stipulate that the annexed copy of portions of Plaintiff's Exhibit 1 in this action shall constitute and be a part of the bill of exceptions duly settled and allowed herein and that said copy of portions of said exhibit shall be considered and used as Plaintiff's Exhibit 1 and as a part of the record in this cause, and that it shall not be necessary to include in the printed record herein the whole of said Plaintiff's Exhibit 1. The parties further stipulate that said Exhibit 1 may be forwarded with the record herein to the Circuit Court of Appeals for the Ninth Circuit upon defendant's writ of error, but that the annexed copy of portions of said exhibit may be used instead of the exhibit in making up the record herein.

Dated November 23, 1917.

W. A. Robbins,

Attorney for Plaintiff.

Carey & Kerr,

Charles A. Hart,

Attorneys for Defendant.

And afterwards, to-wit, on the 8th day of November, 1917, there was duly filed in said court a petition for writ of error in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

Portland Feeder Company, a corporation, the defendant above named, conceiving itself aggrieved by the order made and the judgment entered thereon in this proceeding on the 29th day of September, 1917, and by the rulings made in this action as will appear from the assignment of errors filed herewith, and whereby it was adjudged that plaintiff have and recover from defendant the sum of \$1,116.95, together with its costs and disbursements incurred in said action, comes now and petitions said court for an order allowing it, said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided for the cor-

rection of the error so complained of, and also for an order fixing the amount of the supersedeas bond which the defendant shall give and furnish upon said writ of error, and that upon the giving of such bond all further proceedings in this court be suspended, stayed, and superseded until the determination of such writ of error by the United States Circuit Court of Appeals in and for said Ninth Circuit. And your petitioner will ever pray, et cetera.

Carey & Kerr,

Charles A. Hart,

Attorneys for Defendant.

---

And afterwards, to-wit, on the 8th day of November, 1917, there was duly filed in said court assignments of error, in words and figures as follows, to-wit:

#### ASSIGNMENTS OF ERROR.

In the Circuit Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

Comes now the above named defendant, Port-



land Feeder Company, and makes and files the following assignments of error upon which it will rely upon its prosecution of a writ of error in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this honorable court made and entered on the 29th day of September, 1917.

The learned court erred as follows :

### I.

In overruling the defendant's motion for an order adopting and making findings of fact and conclusions of law determining that defendant is entitled to a dismissal of this action and for judgment for costs and its disbursements upon the ground that the tariffs of plaintiff and its connecting carriers attempted to be applied to the transportation of defendant's property were ambiguous and justified the freight charges actually collected prior to the commencement of the action.

### II.

In making and entering general findings for plaintiff herein, and in ordering and directing the entry of judgment in favor of plaintiff and against defendant, and in determining that the tariffs of plaintiff and its connecting carriers properly interpreted required the collection of the freight charges demanded by plaintiff and required the

entry of judgment against defendant for such freight charges.

Carey & Kerr,  
Charles A. Hart,  
Attorneys for Defendant.

---

And afterwards, to-wit, on the 8th day of November, 1917, the same being the fourth judicial day of the regular November term of said court, present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER ALLOWING WRIT OF ERROR AND  
FIXING BOND ON WRIT OF ERROR.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

Upon motion of Charles A. Hart, one of the attorneys for defendant, Portland Feeder Company, in the above entitled cause, and upon the filing of petition for writ of error and assignments of error heretofore filed herein;

It is hereby ordered that the writ of error as

prayed for in said petition be allowed, and that the amount of the supersedeas bond to be given by defendant, Portland Feeder Company, upon said writ of error be and the same is hereby fixed at the sum of fifteen hundred dollars (\$1,500), and that upon the giving of said bond all further proceedings in this court be suspended, stayed, and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 8th day of November, 1917.

CHARLES E. WOLVERTON,

Judge.

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And afterwards, to-wit, on the 9th day of November, 1917, there was duly filed in said court a bond in words and figures as follows, to-wit:

**BOND ON WRIT OF ERROR.**

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

Know All Men by These Presents, That We,  
Portland Feeder Company, a corporation, as

principal, and National Surety Company, a corporation duly organized under the laws of the state of New York, and duly qualified to do business within the state of Oregon, as surety, are held and firmly bound unto the plaintiff in the above entitled action in the sum of fifteen hundred dollars (\$1,500) for the payment of which well and truly to be made the undersigned bind themselves and each of them jointly and severally, and their successors, representatives, and assigns respectively, firmly by these presents.

Sealed with our seals and dated this 8th day of November, 1917.

Whereas, the above named defendant, Portland Feeder Company, has sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit to reverse the judgment entered in the above entitled action in favor of plaintiff therein and against defendant for the sum of \$1,116.95, together with interest and costs.

Now, therefore, the condition of this obligation is such that if the above-named Portland Feeder Company, a corporation, shall prosecute such writ of error to effect and answer all damages and costs if it shall fail to make good said plea, then this obli-

gation shall be void; otherwise to remain in full force and effect.

PORTLAND FEEDER COMPANY,

By Carey & Kerr,

Charles A. Hart,

Its Attorneys.

NATIONAL SURETY COMPANY,

By J. C. Ainsworth,

(Corporate Seal) Resident Vice-President.

Attest: Clarence D. Porter,

Resident Assistant Secretary.

Countersigned at Portland, Oregon, November 8,  
1917,

NATIONAL SURETY COMPANY,

By Jas. McL. Wood & Co.,

Resident Agents.

Approved this 9th day of November, 1917.

CHARLES E. WOLVERTON,

Judge.



## STIPULATION.

In the District Court of the United States for the  
District of Oregon.

Oregon Short Line Railroad Company, a corporation,

Plaintiff,

vs.

Portland Feeder Company, a corporation,

Defendant.

The parties hereto stipulate that the foregoing record, pages 1 to 241, inclusive, is a true and correct copy of the record of this action in the District Court of the United States for the District of Oregon, and the clerk of said District Court of the United States for the District of Oregon may certify the same upon this stipulation as a true and correct copy of said record without comparison thereof with the original record in his office.

Dated December 26, 1917.

...A. C. Spencer...

...M. A. Robbins...

Attorneys for Plaintiff.

...Lurey D. Kerr...

...Charles A. Bart...

Attorneys for Defendant.

CERTIFICATE OF CLERK OF UNITED STATES  
DISTRICT COURT TO TRANSCRIPT  
OF RECORD.

United States of America, District of Oregon—ss:

I, G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify in accordance with the foregoing stipulation of the parties and without comparison with the record, that the foregoing pages numbered 4 to 241, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of *Oregon Short Line Railroad Company*, plaintiff and defendant in error, against *Portland Feeder Company*, defendant and plaintiff in error, as the same remain of record and on file in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland in said District this 27<sup>th</sup> day of December, 1917.

.....G. H. Marsh.....

Clerk United States District Court,  
District of Oregon.

(Seal)



5

**United States Circuit Court  
of Appeals  
For the Ninth Circuit**

---

PORTLAND FEEDER COMPANY, a corporation,  
*Plaintiff in Error,*

*vs.*

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,

*Defendant in Error.*

---

**Brief for Plaintiff in Error**

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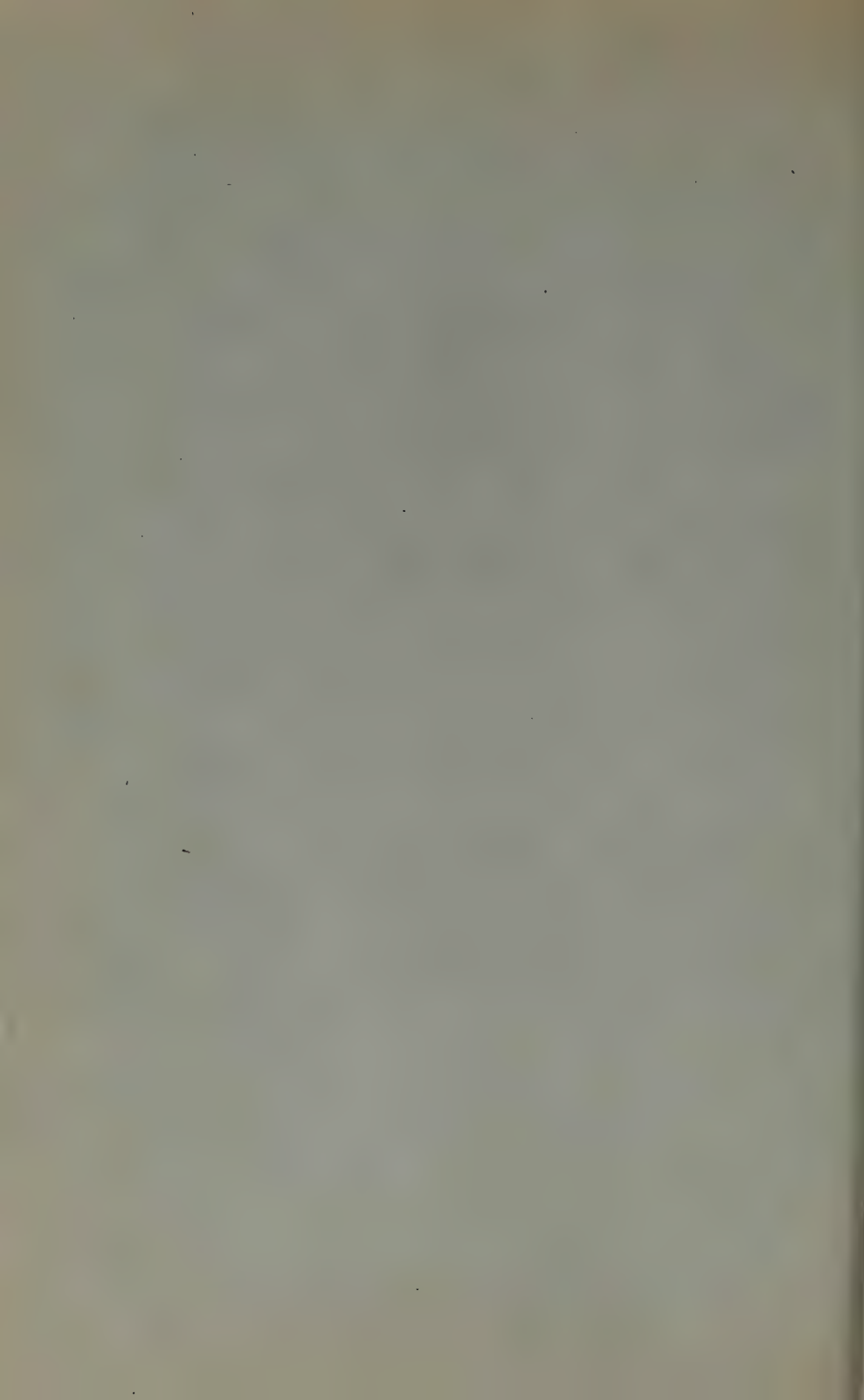
On Writ of Error to the District Court of the  
United States for the District of Oregon.

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CAREY AND KERR and  
CHARLES A. HART,

Yeon Building,  
Portland, Oregon,  
Attorneys for Plaintiff in Error.

FILED  
FEB 4 - 1910  
F. D. HONOLULU





No. 3104

# United States Circuit Court of Appeals

For the Ninth Circuit

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PORTLAND FEEDER COMPANY, a corporation,  
*Plaintiff in Error,*

*vs.*

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,  
*Defendant in Error.*

---

## Brief for Plaintiff in Error

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On Writ of Error to the District Court of the  
United States for the District of Oregon.

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### STATEMENT OF THE CASE.

This is a companion case to No. 3103, *Portland Cattle Loan Company*, a corporation, plaintiff in error, v. *Oregon Short Line Railroad Company*, a corporation, defendant in error. The cases were not consolidated, but were tried to the court as one case, separate findings and separate judgment, however, being entered in favor of defendant in error. Identically the same question is involved in

each case and the parties are agreed that the two cases may be submitted together on the briefs filed in No. 3103.

We therefore ask leave to refer to the brief filed for plaintiff in error in No. 3103; and we shall include in this memorandum only a statement of the particulars in which the facts herein differ from those in No. 3103.

This action is one to recover a balance of freight charges claimed to be due for the transportation of two train loads of cattle: one from Hereford, Texas, to Red Rock, Montana, and the other from Abernathy, Texas, to points in Idaho (Transcript pp. 5-9). Hereford and Abernathy are stations on the Pecos and Northern Texas Railway a short distance from Amarillo, which under the tariffs was a base point for rate making. The shipments moved through Amarillo and the dispute is over the claim of the Railway Company (asserted years after the shipment was handled) that the rate from the base point, Amarillo, was not applicable from Hereford and Abernathy either as a flat rate or with a differential, and that the local charges from the initial points to the base point, Amarillo, were collectible.

The second cause of action involving the shipment from Abernathy to Idaho points may be disregarded in the consideration of the case here in view of the concession made by plaintiff in error

at the trial (Transcript pp. 155-156). The point of origin of these shipments, Abernathy, is a station listed in the tariffs as one taking a differential over the Amarillo rate of \$116.50; and this rate construction is made contingent upon routing and application provisions with respect to the initial and delivering lines, which application and routing provisions as to the lines concerned in this shipment do not appear in the tariff (Transcript pp. 225, 226, 231, 232).

The shipment involved in the second cause of action is in the same situation as the shipment in the Portland Cattle Loan Company case, No. 3103. It originated at Hereford and the rate charged and collected for its transportation was made up in the same way; that is, by applying to Hereford the Amarillo base rate of \$116.50 (Transcript p. 185).

The question in this case is therefore identical with that in No. 3103. The present contention of the carriers is that the tariff did not permit the application of the Amarillo base rate to Hereford, but that the local charge between these points was collectible. Plaintiff in error insists that the original construction given the tariffs is the correct one, and that there was ample tariff authority for applying the \$116.50 Amarillo rate to shipments originating at Hereford, and that no further charge is now properly assessable.

### ASSIGNMENTS OF ERROR.

The court erred in overruling the motion of plaintiff in error for findings in its favor upon the ground that the tariffs of defendant in error and its connecting carriers authorized the rate originally collected and did not permit or require a subsequent collection of any additional charges; and the court erred in making and entering general findings for defendant in error and in holding and determining that the tariff of the carriers authorized and required the collection of the local rate from Hereford to Amarillo in addition to the charges previously paid.

## ARGUMENT.

As previously stated, the only question in this case is whether under the applicable railway tariffs the carriers properly applied to the Hereford shipment of plaintiff in error the Amarillo base rate of \$116.50. This is the controlling question in the Portland Cattle Loan case, No. 3103, and the position of plaintiff in error is fully discussed by the brief served and filed on behalf of plaintiff in error in that case. Since the cases were tried together and presumably will be argued and submitted together, we assume no necessity exists for repeating here the argument made in the briefs filed in No. 3103. We therefore ask leave to refer to the brief of plaintiff in error in No. 3103, and ask that the argument there made in support of the contention that the railway tariffs justified the application of the Amarillo rate to Hereford be considered as having been made on behalf of plaintiff in error in this case.

Respectfully submitted,

CAREY AND KERR and

CHARLES A. HART,

Attorneys for Plaintiff in Error.





In the  
**United States Circuit Court  
of Appeals**

**For the Ninth Circuit**

---

PORTLAND FEEDER COMPANY, a corporation,  
Plaintiff in Error.

vs.

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,  
Defendant in Error.

---

**Brief for Defendant in Error**

---

**On Writ of Error to the District Court of the  
United States for the District of Oregon**

---

CAREY and KERR and CHARLES A. HART,  
Yeon Building, Portland, Oregon, Attorneys for  
Plaintiff in Error.

GEO. H. SMITH, A. C. SPENCER and W. A.  
ROBBINS, Wells Fargo Building, Portland,  
Oregon, Attorneys for Defendant in Error.

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No. 3104

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In the  
**United States Circuit Court  
of Appeals**

**For the Ninth Circuit**

---

PORTLAND FEEDER COMPANY, a corporation,  
Plaintiff in Error.

vs.

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,  
Defendant in Error.

---

**Brief for Defendant in Error**

---

**On Writ of Error to the District Court of the  
United States for the District of Oregon**

---





*United States Circuit Court of Appeals for the  
Ninth Circuit.*

PORTLAND FEEDER COMPANY, a corporation,  
Plaintiff in Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY,  
a corporation,  
Defendant in Error.

---

CAREY and KERR and CHARLES A. HART,  
Yeon Building, Portland, Oregon, Attorneys for  
Plaintiff in Error.

GEO. H. SMITH, A. C. SPENCER and W. A.  
ROBBINS, Wells Fargo Building, Portland,  
Oregon, Attorneys for Defendant in Error.

## STATEMENT OF THE CASE.

This is a companion case to *Oregon Short Line Railroad Company v. Portland Cattle Loan Company*, and while these cases were not consolidated, they were in fact tried together in the lower court and general findings made in favor of the defendant in error as is shown in 245 Federal, page 214.

The tariffs and rates involved in this case are substantially the same as those involved in the Portland Cattle Loan case, and no good purpose can be served in re-arguing the general question. However, as the thirty-two cars of cattle, described in defendant in error's second cause of action, moved from Abernathy, Texas, instead of Hereford, Texas, it will be necessary to briefly refer to the application of rates from Abernathy to Oregon Short Line Railroad points.

## POINTS AND AUTHORITIES.

## I.

On the thirty-two cars of cattle moving from Abernathy to O. S. L. points, it is conceded that defendant in error is entitled to recover the sum of six hundred twenty-seven dollars and twenty cents (\$627.20), as prayed for in its second cause of action, (Trans. of Record, page 153 *et seq.*).

## II.

There is no controversy in this case concerning the application of rates north of Amarillo, but the entire controversy is centered about the charges from Abernathy to Amarillo.

Trans. of Record, pp. 51-168.

## ARGUMENT.

This case involves two causes of action. In the first one the plaintiff is seeking to recover the sum of two hundred thirty dollars and forty cents, (\$230.40), representing the balance due on a shipment of thirty-six cars of cattle moving from Hereford, Texas, to Monida, Montana. The amount involved in the first cause of action is made up as follows:

Sept. 14, 1912. Defendant shipped 36 cars of cattle from Hereford, Texas, to Mon- ida, Montana, at \$144.90 per car.....	\$5,216.40
Received on account .....	4,986.00
Balance due .....	<hr/> \$ 230.40

The construction and application of rates from Hereford to O. S. L. points has already been argued at length in defendant in error's brief in the Portland Cattle Loan case and the same argument will apply in this case.

In the second cause of action, plaintiff is seeking to recover the sum of six hundred and twenty-seven dollars and twenty cents, (\$627.20), representing the balance due on a shipment of twenty-one cars of cattle moving from Abernathy, Texas, to Pocatello, Idaho, and eleven cars of cattle moving from Abernathy, Texas, to Pocatello, Idaho, which cars were later diverted to American Falls, Idaho. The amount involved in the second cause of action is made up as follows:

21 cars Abernathy to Pocatello at \$156.10	
per car .....	\$3,278.10
11 cars, Abernathy to Pocatello, diverted to	
American Falls, at \$170.10 per car.....	1,871.10
	<hr/>
Total freight charges .....	\$5,149.20
Received on account .....	4,522.00
	<hr/>
Balance due .....	\$ 627.20

In regard to the amount prayed for by the defendant in error in the second cause of action, we call the court's attention to page 155, *et seq.*, to the Transcript of Record, wherein counsel for plaintiff in error admits that defendant in error's construction and application of the tariffs, insofar as the Abernathy shipments are concerned is correct, and that defendant in error is entitled to recover the sum of six hundred twenty-seven dollars and twenty cents (\$627.20) ; we are, therefore, only concerned in regard to the charge of two hundred forty dollars and thirty cents, (\$240.30), representing the amount prayed for in defendant in error's first cause of action, which involves the shipments moving from Hereford to O. S. L. points. As we have already pointed out, the tariffs covering the movement from Hereford to O. S. L. points have been argued at length in the Portland Cattle Loan case, and we therefore, do not deem it necessary to repeat the same argument herein. We do, however, wish to call the court's attention to the fact that there is no dispute between the litigants concerning the proper application of rates to be applied north of Amarillo. (Trans. of Record, pages 51-168.)

The court will observe, by referring to page 134, *et seq.*, of the Transcript of Record, that Mr. J. H.



Lothrop, an expert witness, was called on behalf of the plaintiff in error and undertook to construe the tariffs in question. The substance of his testimony is, *first*, that the Amarillo rate applies from Hereford through to O. S. L. points, because no differential is shown in Section 1, page 26 of Plaintiff's Exhibit 1, (Trans. of Record, page 141), and *second*, that the Abernathy rate will not apply through to O. S. L. points because a differential of eight dollars and eighty cents is shown, over the Amarillo rate on page 26 of Plaintiff's Exhibit 1, (Trans. of Record, page 144), and *third*, the witness admitted, that there is no through routing shown in the tariff from P. & N. T. points to O. S. L. points, (Trans. of Record, page 148).

To show the inconsistency of Mr. Lothrop's testimony in regard to Abernathy rates, we desire to call the court's attention to Item 200, page 24 of Plaintiff's Exhibit 1, which says:

"The differentials shown in Section No. 1 are to be added to or deducted from the Amarillo, El Paso or Deming rates, as shown in Section No. 2 hereof, pages 32 to 51, inclusive, to arrive at the through rate, *where application and routing is provided on pages 56 to 69.*

"When no differentials are shown the Amarillo or El Paso, Deming rates as shown in Section No. 2 are to be applied *as indicated.*"

Pages 56 to 69 shows (page 57), under application of rates, no through routes are named from P. & N. T. points to O. S. L. points. Notwithstanding this fact, the witness would have the court believe, that where no differential is shown in Section No. 2 of the tariff, that Hereford would take the Amarillo rate even though the P. & N. T. Ry. Co. and the O. S.



L. R. R. Co. refused to enter into any through routing arrangements. The absurdity of this contention is apparent by referring to Section No. 1, page 26 of Plaintiff's Exhibit 1. Under the heading of "Pecos & Northern Texas Railway," the court will note under Index No. 98, that all shipments moving from Hereford take the Amarillo rate where a through route is named on page 57 of Exhibit 1, whereas Abernathy, which is also shown on page 26 of Plaintiff's Exhibit 1, under Index No. 120, takes a differential of eight dollars and eighty cents over the Amarillo rate; in all cases where through routes are provided on page 57, Plaintiff's Exhibit 1, the tariff plainly states on page 26, that the differential of eight dollars and eighty cents must be added to the Amarillo rate on shipments moving from Abernathy.

Notwithstanding this plain statement in the tariff, Mr. Lothrop testified that on shipments moving from Abernathy to O. S. L. points, the differential of eight dollars and eighty cents could not be applied, under Item 200 of Section No. 1 of the tariff, for the reason that a differential is shown on shipments moving from Abernathy, which therefore makes it necessary to apply the combination of locals, rather than the eight dollars and eighty cents differential above referred to, in other words, the tariff plainly says, on page 26 of Plaintiff's Exhibit 1, that on all shipments moving from Abernathy, a differential of eight dollars and eighty cents must be added to the Amarillo rate, whereas on shipments moving from Hereford, the Amarillo rate will apply. Mr. Lothrop seeks to apply the rule insofar as the Hereford shipments are concerned, totally disregarding the fact that no through route is

shown on page 57 of the tariff, and then states that the eight dollars and eighty cents differential could not be added on the Abernathy shipments, for the reason that no through route is shown in the tariff, and therefore the rate from Abernathy must be made up by combination of locals, as prayed for in defendant in error's second cause of action; we call the attention of the court to the fact that Hereford and Abernathy are both P. & N. T. points and that no through routes are provided from any P. & N. T. points to O. S. L. points.

We submit there is no justification for such a strained construction of tariff, and as a matter of fact, the admission by plaintiff in error that defendant in error is entitled to recover on the second cause of action shows the absurdity and inconsistency of such a construction of the tariff.

We respectfully submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

GEO. H. SMITH,  
A. C. SPENCER,  
W. A. ROBBINS,  
Attorneys for Defendant in Error.



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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AMERICAN CENTRAL INSURANCE COM-  
PANY, NATIONAL FIRE INSURANCE  
COMPANY OF HARTFORD, INSUR-  
ANCE COMPANY OF NORTH AMER-  
ICA, NATIONAL UNION FIRE INSUR-  
ANCE COMPANY OF PITTSBURG, PA.,  
SECURITY INSURANCE COMPANY OF  
NEW HAVEN,

Appellants,

vs.

DAVID ISAACS,

Appellee.

---

Transcript of Record.

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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FILED  
JAN 11 1918





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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AMERICAN CENTRAL INSURANCE COM-  
PANY, NATIONAL FIRE INSURANCE  
COMPANY OF HARTFORD, INSUR-  
ANCE COMPANY OF NORTH AMER-  
ICA, NATIONAL UNION FIRE INSUR-  
ANCE COMPANY OF PITTSBURG, PA.,  
SECURITY INSURANCE COMPANY OF  
NEW HAVEN,

Appellants,

vs.

DAVID ISAACS,

Appellee.

---

**Transcript of Record.**

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States in and for  
the Northern District of California, Second Di-  
vision.*

No. 253—IN EQUITY.

AMERICAN CENTRAL INSURANCE COM-  
PANY, NATIONAL FIRE INSURANCE  
COMPANY OF HARTFORD, INSUR-  
ANCE COMPANY OF NORTH AMERICA,  
NATIONAL UNION FIRE INSURANCE  
OF PITTSBURG, PA., SECURITY IN-  
SURANCE COMPANY OF NEW HAVEN,  
Plaintiffs,

vs.

DAVID ISAACS,

Defendant.

**First Amended Bill of Complaint.**

To the Honorable the Judges of the District Court  
of the United States in and for the Northern  
District of California, Second Division, in Chan-  
cery Sitting:

American Central Insurance Company, a citizen of  
the State of Missouri, in the United States of Amer-  
ica, National Fire Insurance Company of Hartford,  
a citizen of the State of Connecticut, in the United  
States of America, Insurance Company of North  
America, a citizen of the State of Pennsylvania, in  
the United States of America, National Union Fire  
Insurance Company of Pittsburg, Pa., a citizen of  
the State of Pennsylvania, in the United States of  
America, and Security Insurance Company of New  
Haven, a citizen of the State of Connecticut, in the

2      *American Central Insurance Company et al.*

United States of America, bring this their bill of complaint against David Isaacs, a citizen of the State of California and of the Northern District of the State of California:

And thereupon complainants allege:

I.

That American Central Insurance Company is a corporation created by and existing under and by virtue of the laws of the State of Missouri; that National Fire Insurance Company of Hartford [1\*] is a corporation created by and existing under and by virtue of the laws of the State of Connecticut; that Insurance Company of North America is a corporation created by and existing under and by virtue of the laws of the State of Pennsylvania; that National Union Fire Insurance Company of Pittsburg, Pa., is a corporation created by and existing under and by virtue of the laws of the State of Pennsylvania; that Security Insurance Company of New Haven is a corporation created by and existing under and by virtue of the laws of the State of Connecticut; and were each and all such corporations during all the times hereinafter mentioned.

That David Isaacs, the defendant, is a citizen and inhabitant of the State of California and of the Northern District of California, in the United States of America.

That the amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000, and there exists to your complainants no plain, adequate and complete remedy at law.

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\*Page-number appearing at foot of page of original certified Transcript of Record.



## II.

That your complainants are and at all the times hereinafter mentioned were fire insurance companies carrying on business individually and through underwriters in the State of Washington in the United States of America; and on or about the 11th day of August, 1913, were insurers as aforesaid in various proportional amounts of the stock of merchandise of A. Bridge in the store of A. Bridge & Co., in the city of Seattle in the said State of Washington. That on or about said date a fire occurred in the said store and merchandise causing a loss. That the assignee for said Bridge and complainants, his insurers, could not agree upon the amount of damage. That the said Bridge stock of merchandise was inventoried at some \$48,000.00, and after negotiations between your complainants and the assignee of said assured the sound value of the said stock of said Bridge remaining after said fire was fixed at \$34,300.00, as a compromise between your complainants and the assignee of said Bridge, and your complainants for said amount purchased the whole of said stock of merchandise [2] from the assignee of said Bridge, their assured. That the defendant contracted with your complainants to dispose of this their stock of merchandise for them, offering to advance them a guarantee of \$18,100.00, in cash and to take over from them as their trustee their said merchandise in its entirety and to sell and dispose of the same for them to the best possible advantage and to return to them any and all monies taken in by him for them on such sale over and above his said

guarantee and actual expenses. That the complainants accepted defendant's said offer and delivered over their said stock of merchandise into his hands to do his best for them on the terms and conditions aforesaid. That the defendant after thus contracting with the complainants did actually take over into his exclusive and sole possession and control their said stock of merchandise and as their said trustee and upon the terms and conditions mentioned above proceeded to sell the same in the said city of Seattle and State of Washington, and sold all of your complainants' said stock of merchandise therein; but, as your complainants are informed and believe and therefore allege the fact to be, said defendant, their trustee, did not return to them the monies taken in by him for them on such sale over and above his said guarantee and actual expenses but has retained in his possession sums of monies belonging to your complainants the amounts of which they are unable to state and which cannot be ascertained without the accounting herein prayed.

### III.

That following said sale and on or about the 26th day of November, 1913, this defendant rendered a statement to your complainants of his said operations as their trustee, as follows:

“STATEMENT—SALVAGE OF A. BRIDGE  
& CO.

Clothing, furnishing, shoes, net sales. . . . \$28,901.92

Expense:

Rent . . . . . \$ 920.00

Light . . . . . 66.88

Advertising . . . . . 1204.21

Clerk Hire. . . . . 1655.21

Materials . . . . . 90.84 [3]

Insurance . . . . . 34.59

Commision for handling

at 20% on \$28.901.92. .5780.38

Advance of guarantee. . . 18100.00

---

\$27852.11      27,852.11

---

Net proceeds \$1,049.81”

and the said purported “net proceeds” were paid over to your complainants, who at the time believed and had no other knowledge nor had information of any kind to put them on inquiry, to question the said statement or good faith of their trustee, this defendant. That your complainants are informed and believe and therefore charge the fact to be that said statement did not constitute a full accounting by said defendant as their trustee and that the expense items of said statement are excessive and likewise with the totals false and untrue; and your complainants ask discovery of your Honors of the entire true expenditures and receipts of said sale.

IV.

That since the rendition of the statement aforesaid

and the payment of the said \$1,049.81, purported "net proceeds" therein, a suit was begun in this court against this defendant Isaacs, as Equity Case 83, entitled Harry C. Seynei, Plaintiff, vs. David Isaacs, Defendant, to establish a partnership in a portion of this same said Bridge stock of merchandise after the sale by the defendant for your complainants' account, and for an accounting; the cause after hearings had over a period of some year and a half having been brought to a conclusion upon the 9th day of February, 1916. That upon the said hearings evidence was given under oath by the defendant's partner who managed the entire sale at Seattle conducted by this defendant Isaacs for your complainants' account, that sums in cash were received by said Isaacs upon the said sale for the account of these insurance companies, your complainants, largely in excess of the said sum of \$28,901.92, which this defendant claimed in his above statement to be the total of his receipts; [4]

That this knowledge of the fact of such evidence and of the facts themselves aforesaid has only come of recent date to your complainants and were not discovered or made known to them before ten days prior to the filing of this their bill of complaint. That your complainants reside in other states than that of Washington and had no personal knowledge of the facts herein set forth and your complainants trusted and believed the said representations of their trustee this defendant and did not before the time above-mentioned discover any of the facts as to the falsity of his said statement to them of said sale until



so apprised of the said evidence and of the facts so referred to under oath in said cause 83.

Your complainants therefore expressly charge and aver that they relied upon and were misled by the said false representations of his expenditures and receipts made at said time to them by their said trustee through his said statement; and that your complainants in ignorance of their falsity accepted as true and as made to them in good faith the said misrepresentations of facts therein contained. That thereafter the fact of the falsity of the said statement rendered them by their said trustee and the fact of the existence of monies so withheld by him from them has been sedulously and fraudulently concealed by him, said defendant, to the present time.

Your complainants therefore allege and charge the fact to be that said defendant sold the said Bridge stock of merchandise belonging to your complainants at a large advance beyond the said sum of \$28,901.92, the amount of excess thereover being unknown to your complainants and of which they ask discovery and an accounting from said defendant. [5]

V.

And your complainants further show that before the filing of this their bill of complaint, and as late as the very day of the filing of said bill, they have applied to the said defendant, David Isaacs, and requested him to come to a full and fair account in respect to all the said transactions of said entire sale of their stock of merchandise in Seattle; with which just and reasonable request complainants well hoped that said defendant would have complied, as in jus-



tice and equity he should have done; but that defendant has flatly refused said request.

## VI.

That said defendant during all the times mentioned herein occupied a position of peculiar trust and confidence towards your complainants, a fiduciary relation requiring the utmost good faith as their trustee. That he had in his exclusive possession and control their said Bridge stock of merchandise which had been inventoried at some \$48,000 and for which they had paid the assignee of the assured \$34,300 in cash. That your complainants were at a distance, citizens of other states than the State of Washington and had to rely upon the good faith of this defendant as their trustee. That now, with their knowledge just acquired of the incorrectness and falsity of the said account rendered and purported balance paid to them, they bring this their bill before your Honors in Chancery and ask a full and explicit account from their trustee, this defendant, of their said merchandise sold and disposed of by him; and that he be held to account and pay over to your complainants in the various proportional amounts respectively as they shall each be found entitled. Your complainants charge that if the said accounts between them and this defendant are properly taken and a just and true settlement had of the same it will appear that a considerable balance is due from this defendant to your complainants, the amount of which they are unable to ascertain without such accounting and [6] except in a Court of Equity.

## VII.

That your complainants by reason of the attitude of the defendant in refusing them a full and fair account of his operations as their trustee, have been compelled to employ counsel to bring this suit and have become indebted through their said employment of counsel in a sum which will depend upon the future character of the litigation.

## WHEREFORE COMPLAINANTS PRAY:

That an account may be taken of all sums of money received by or come to the hands of the defendant upon his said sale of the said Bridge stock of merchandise, for, on account of, and for the use of the complainants, and of all dealings and transactions of the defendant as such trustee; and that the defendant may be ordered to pay to the complainants what, on taking such account, shall be found to be due from defendant to complainants.

That the defendant may be compelled to set forth an account of all and every sum and sums of money received by him or by any person or persons by his order, or for his use, for or in respect to your complainants' said Bridge stock of merchandise, from the time it came into his hands to the present time, and when and from whom and from what in particular all and every such sums were respectively received, and how the same respectively have been applied and disposed of.

That the defendant may answer the premises and that the expenses and counsel fees of complainants in this litigation may be charged and determined and that payment thereof by this defendant be decreed

by this Court, and that said defendant pay the costs of this suit.

And for such other and further relief as your Honors may at any time find meet and equitable.

JESSE OLNEY,

Solicitor and Counsel for Complainants. [7]

United States of America,

Northern District of California,—ss.

Jesse Olney, being duly sworn, deposes and says:

I am the solicitor and counsel for the complainants in the foregoing First Amended Bill of Complaint.

I have read the said First Amended Bill of Complaint and know the contents thereof, and that the same is true of my own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is not made by one of the complainants is that said complainants are all citizens of other states than the State of California and not within the Northern District of California wherein my office is situated; and for the further reason that the allegations of said bill of complaint are more within my own knowledge than of the officers of any of the said corporations complainant.

JESSE OLNEY.

Subscribed and sworn to before me, this 4th day of May, 1916.

[Seal]

WALTER B. MALING,

Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed May 4, 1916. Walter B. Mal-  
ing, Clerk. [8]

---

(Title of Court and Cause.)

**Answer to First Amended Bill of Complaint.**

Now comes David Isaacs, the defendant in the above-entitled action, and hereby makes answer to plaintiffs' First Amended Bill of Complaint, and, for answer thereof, denies, admits and alleges, as follows:

I.

Denies that the amount in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand (3,000) Dollars, or any other sum, and there exists to your complainants no plain, adequate and complete remedy at law; or that the amount in controversy herein exceeds, exclusive of interest or costs, the sum of Three Thousand (3,000) Dollars, or any other sum, or there exists to your complainants no plain, adequate or complete remedy at law.

II.

Denies that said Bridge stock was inventoried at some Forty-eight Thousand (48,000) Dollars, or any other sum more than Forty-five Thousand Nine Hundred and Fifty-four (45,954) Dollars, and after negotiations between your complainants and the assignee of said assured the sound, or any, value of the said stock of said Bridge remaining after said fire was fixed at Thirty-four Thousand Three Hundred (34,300) Dollars, or any other sum, as a compromise



between your complainants and the assignee of said Bridge, and in this behalf said defendant alleges:

That after negotiations between complainants and the assignee of said assured, the sound value of said stock of said Bridge before said fire was fixed at Thirty-four Thousand Three Hundred (34,300) Dollars. [9]

### III.

Denies that said defendant did not return to complainants all of the monies taken in by him for them, or either of them, on such or any sale, over and above his said guarantee and actual expenses, but has retained in his possession sums of monies belonging to complainants, or either of them, the amounts of which they, or either of them, are unable to state and which cannot be ascertained without the, or any, accounting herein prayed; or that said defendant did not return to complainants all of the monies taken in by him for them, or either of them, on such, or any, sale over or above his said guarantee or actual expenses, but has retained in his possession sums of monies belonging to complainants, or either of them, the amounts of which they, or either of them, are unable to state or which cannot be ascertained without the, or any, accounting herein prayed.

### IV.

Denies that at the time said net proceeds were paid over to complainants by defendant, complainants had no other knowledge nor had information of any kind to put them on inquiry, to question the said statement or good faith of their trustee, this defendant, and in this behalf said defendant alleges:



That at the time of the rendition of said statement set forth in the Third Allegation of complainants' said amended bill, said complainants and each of them had full and complete information concerning all the matters, items and things alleged and contained in said statement.

Denies that said statement did not constitute a full accounting by said defendant, as their trustee, and that the expense items of said statement are excessive and likewise, or at all, with the totals, false and untrue; or that said statement did not constitute a full accounting by said defendant, as their trustee, or that the expense items of said statement are excessive or likewise, or at all, [10] with the totals, false or untrue.

## V.

That defendant has no information upon the subject sufficient to enable him to answer Allegation IV of said amended bill, and placing his denial upon that ground denies that upon the said, or any, hearings evidence was given under oath by the defendant's partner who managed the entire, or any, sale at Seattle, or any other place, conducted by this defendant for complainants' account, that sums in cash were received by defendant upon the said or any, sale for the account of complainants, or either of them, largely, or at all, in excess of said sum of Twenty-eight Thousand Nine Hundred and One and 92/100 (28,901.92) Dollars; that if any such evidence was given by said partner the same was and is untrue and false.

## VI.

Denies that said complainants, or either of them, relied upon and were misled by the said false, or any, representations of defendant's expenditures and receipts made at said or any time to them, or either of them, by defendant through his said, or any, statement, and that complainants, or either of them, in ignorance of their falsity accepted as true and as made to them, or either of them, in good faith the said misrepresentations of the facts therein contained; or that said complainants, or either of them, relied upon or were misled by the said false, or any, representations of defendant's expenditures or receipts made at said or any time to them or either of them by defendant through his said or any statement, or that complainants or either of them, in ignorance of their falsity accepted as true or as made to them or either of them, in good faith the said misrepresentations of the facts therein contained.

Denies that thereafter, or any other time, the fact of the falsity of the said, or any statement rendered to complainants or either of them by their said trustee, and the fact of the existence [11] of monies so, or at all, withheld by him from them, or either of them, has been sedulously and fraudulently, or at all, concealed by him, said defendant, to the present time, or any other time, or at all; or that thereafter, or any other time, the fact of the falsity of the said, or any, statement rendered to complainants, or either of them, by their said trustee, or the fact of the existence of monies so, or at all, withheld by him from them, or either of them, has been sedulously or fraud-

ulently or at all, concealed by him, said defendant, to the present time, or any other time, or at all.

Denies that the defendant sold the said Bridge stock of merchandise belonging to complainants at a large, or any, advance beyond the said sum of Twenty-eight Thousand Nine Hundred and One and 92/100 (28,901.92) Dollars, or for any sum greater than said sum of \$28,901.92.

## VII.

Denies that at any time before the filing of complainants' Bill of Complaint, and as late as the very day of the filing of said bill, complainants, or either of them, applied to said defendant and requested him to come to a full and fair, or other, account in respect to all or any of said transactions of said entire, or any, sale of their stock of merchandise in Seattle or any other place; with which just and reasonable, or any, request complainants or either of them well, or at all, hoped that said defendant would have complied, as in justice and equity he should have done but that defendant has flatly or at all refused said or any request; or that at any time before the filing of Complainants' Bill of Complaint or as late as the very day of the filing of said bill, complainants, or either of them, applied to said defendant or requested him to come to a full or fair, or other, account in respect to all or any of said transactions of said entire, or any, [12] sale of their stock of merchandise in Seattle or any other place; with which just or reasonable or any request, complainants or either of them well, or at all, hoped that said defendant would have complied, as in justice

or equity he should have done; but that defendant has flatly or at all refused said, or any, request, and in this behalf said defendant alleges:

That on the 23d day of February, 1916, complainants, through their attorney and solicitor, called upon defendant in the city and county of San Francisco, State of California, and demanded from defendant that he pay to him for complainants the amount of money due by said defendant to said complainants, and that at said time, defendant informed said attorney and solicitor that he was not indebted to said complainants in any sum or sums on account of his connection with the sale of said Bridge stock.

#### VIII.

Admits that defendant had in his exclusive possession and control said Bridge stock merchandise, but denies that the same had been inventoried for more than Forty-five Thousand Nine Hundred and Fifty-four (45,954) Dollars; admits that complainants paid the assignee for the assured Thirty-four Thousand Three Hundred (34,300) Dollars in cash, but, in this behalf, alleges:

That Eighteen Thousand One Hundred (18,100) Dollars of said amount was received from defendant on account of his employment with complainants.

Denies that if the said accounts between complainants and defendant are properly or at all taken, and a just and true or any settlement had of the same, it will appear that a considerable, or any, balance is due from this defendant to your complainants, or either of them; or that if the said accounts between complainants and defendant are properly, or at all,



taken or a full or true, or any, settlement had of the same, it will appear that a considerable, or any, balance is due from this defendant to your complainants, or either of them. [13]

## IX.

Denies that by reason of the attitude of the defendant in refusing complainants, or either of them, a full and fair, or any, account of his operations as their trustee, complainants or either of them, have been compelled to employ counsel to bring this suit, and have become indebted through their said, or any, employment of counsel in a sum which will depend upon the future character of the litigation; or that by reason of the attitude of the defendant in refusing complainants, or either of them, a full or fair, or any, account of his operations as their trustee, complainants or either of them have been compelled to employ counsel to bring this suit, or have become indebted through their said or any employment of counsel in a sum which will depend upon the future character of the litigation, and, in this behalf, defendant alleges:

That defendant believes and expressly charges and avers that before the filing of complainants' bill in the above-entitled matter, Jesse Olney sought out complainants, informing them that he had been successful in obtaining a judgment against defendant in the said action of "*Seynei v. Isaacs*," and that if said Isaacs were compelled to account to complainants for the moneys received by him, on account of said sale of said "Bridge" stock, it would be found and ascertained that said Isaacs is indebted to said



complainants on account of his employment with complainants in the sale of said stock; and defendant further believes and charges and avers the fact to be, that Jesse Olney at said time agreed with complainants that if they would permit him to act as their attorney in an action to be brought against defendant for said accounting, said Olney would accept said employment on a contingent fee, the amount thereof to be paid solely in the event that said Olney is successful in obtaining a judgment against said Isaacs; that with said understanding, complainants employed said Olney as their attorney in the above-entitled matter. [14]

FOR A FURTHER, SEPARATE AND DISTINCT ANSWER AND DEFENSE TO COMPLAINANTS' SAID BILL, DEFENDANT ALLEGES:

I.

That on or about the 11th day of August, 1913, a fire occurred in the store of A. Bridge & Co., in the city of Seattle, State of Washington, damaging its stock of merchandise; that said stock of merchandise was insured by complainants, in proportional amounts, aggregating Twenty-one Thousand (21,000) Dollars.

That for the purpose of arriving at the sound value of said merchandise before said fire, immediately thereafter said A. Bridge & Co. prepared an inventory of the stock of merchandise covered by said insurance, and claimed to have been in said premises before and at the time of the said fire; that after negotiations between complainants and said

assignee of said A. Bridge & Co., the sound value of said stock of merchandise before and at the time of the fire, was fixed at Thirty-four Thousand Three Hundred (34,300) Dollars; that the amount of said damage to said stock of merchandise by reason of said fire, was fixed by complainants at the sum of Sixteen Thousand Two Hundred (16,200) Dollars; that the said assignee of said A. Bridge & Co. refused to accept said sum of Sixteen Thousand Two Hundred (16,200) Dollars, as the amount of and in full payment of said damage, claiming some Twenty Thousand (20,000) Dollars as the amount of said damage.

That after receiving from defendant a guarantee that the sale of said merchandise, remaining after said fire, would amount to the sum of Eighteen Thousand One Hundred (18,100) Dollars net to complainants, complainants took over for their own use and benefit said merchandise of said A. Bridge & Co. remaining after said fire, and paid to the assignee of A. Bridge & Co. Thirty-four [15] Thousand Three Hundred (34,300) Dollars (the same being the said sound value of said stock of merchandise before said fire) as follows:

Eighteen Thousand One Hundred (18,100) Dollars received from defendant on account of said guaranty, and

Sixteen Thousand Two Hundred (16,200) Dollars contributed by said complainants.

## II.

That said guaranty and payment of Eighteen Thousand One Hundred (18,100) Dollars on the part

of defendant was made upon the express understanding and agreement that complainants engage and employ defendant to sell said remaining stock of merchandise; for which said services complainants agreed to pay to defendant Twenty Per Cent (20%) of all sums realized by him on account of said sale, as also all expenses and costs of maintaining, incident to, and in the sale of said merchandise.

### III.

That defendant thereupon undertook the sale of said merchandise and sold the whole thereof for the sum of Twenty-eight Thousand Nine Hundred and One and  $92/100$  (28,901.92) Dollars; that after deducting the expenses incident to and of said sale, the amount of said commission, and the amount of said guaranty advanced by defendant and paid to the assignee of said A. Bridge & Co., as aforesaid, amounting in all to the sum of Twenty-seven Thousand Eight Hundred and Fifty-two and  $11/100$  (27,852.11) Dollars, on the 26th day of November, 1913, defendant paid over to complainants the balance received on account of said sales, to wit, the sum of One Thousand and Forty-nine and  $81/100$  (1,049.81) Dollars.

### IV.

That said sum of Twenty-eight Thousand Nine Hundred and One and  $92/100$  Dollars represented and was all the moneys that defendant received on account of said sale of said merchandise and that said sum of Twenty-seven Thousand Eight Hundred and Fifty-two and  $11/100$  (27,852.11) Dollars represented and was all of the costs of, incident to, and

in the sale of said merchandise, including [16] said commission and said guaranty aforesaid, and actually paid by defendant in the sale thereof.

FOR A FURTHER, SEPARATE AND DISTINCT ANSWER AND DEFENSE TO COMPLAINANTS' SAID BILL, DEFENDANT ALLEGES:

I.

That in the latter part of August, 1913, complainants employed defendant to sell for them a certain stock of merchandise, in the city of Seattle, State of Washington.

II.

That thereupon defendant entered into his said employment and sold said merchandise, and that on the 26th day of November, 1913, defendant rendered to complainants a full, true and complete statement on all of the sales made by him under said employment, and on said last-mentioned day, defendant paid to complainants all moneys received by him on account of said sales, less the actual costs and expenses incurred and expended in said sale under said employment.

III.

That at the time of rendering said statement and paying said moneys, complainants had full and complete knowledge and information concerning all of the matters and things contained in said statement, and that said complainants accepted said statement and moneys in full settlement of all of said matters and things referred to and contained in said statement.



FOR A FURTHER, SEPARATE AND DISTINCT ANSWER AND DEFENSE TO COMPLAINANTS' SAID BILL, SAID DEFENDANT ALLEGES:

That complainants are guilty of laches and unreasonable delay in the institution of the above-entitled action, and, in this behalf, said defendant alleges:

That complainants were informed and had full information of all of the matters and things contained in said statement referred [17] to in the Third Allegation of said bill, at the time of the rendition thereof; and that, before the institution of said suit of Harry C. Seynei against this defendant, referred to in the Fourth Allegation of complainants' said bill, defendant offered to check with complainants and requested complainants to check with defendant the entire account of sales made by defendant for complainants, as also the costs and expenses connected with, incident to, and of said sale, but that said complainants refused to so check said account.

WHEREFORE, defendant prays that complainants take nothing by their said bill; that said bill be dismissed and that defendant have judgment against complainants, and each of them, for his costs of suit; that defendant recover the amount of his attorney fees incurred in the defense of said action, and that defendant have such other and further relief as may be meet and equitable.

LEON E. PRESCOTT,  
No. 378, Russ Building,  
San Francisco, California,  
Solicitor for Defendant.



State of California,  
City and County of San Francisco,—ss.

David Isaacs, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

DAVID ISAACS.

Subscribed and sworn to before me this 15th day of June, 1916.

[Seal]

MARY L. THOMAS,

Notary Public in and for the City and County of  
San Francisco, State of California. [18]

[Endorsed]: Filed Jun. 15, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

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**Minutes of Court—January 30, 1917—Order Permitting Plaintiffs to File an Amendment to Bill of Complaint.**

At a stated term, to wit, the November term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 30th day of January, in

the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 253—EQUITY.

AMERICAN CENTRAL INS. CO. et al.

vs.

DAVID ISAACS.

**(Order Permitting Plaintiffs to File an Amendment,  
etc.)**

Ordered that plaintiffs may file an amendment to the amended bill of complaint. [20]

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**Minutes of Court—January 31, 1917—Order Granting Defendant Ten Days to Plead to Amended Bill of Complaint.**

At a stated term, to wit, the November term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Wednesday, the 31st day of January, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 253—EQUITY.

AMERICAN CENTRAL INS. CO.

vs.

DAVID ISAACS.

**(Order Amending First Amended Bill of Complaint.)**

Plaintiffs presented and filed their amendment to the First Amended Bill of Complaint. Upon motion of Mr. Olney, it was ordered that said amendment be amended by striking therefrom the following, namely: On page 2, line 13, beginning with the words "that the said sale," etc., and including the remainder of that paragraph. Ordered that the defendant may have ten days within which to plead to said amended bill. [21]

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(Title of Court and Cause.)

**Amendment to First Amended Bill of Complaint.**

Now come the complainants in the above-entitled cause and by leave of the Court amend their first amended bill of complaint, as follows: after the words "said sale" on line eight of page five thereof, insert new paragraphs as below:

The complainants further charge and show to your Honors that this defendant, their trustee, sold in bulk secretly to himself without their knowledge or consent the balance of their said stock of merchandise remaining after only three weeks of his said sale for them in the city of the Seattle, State of Washington. That knowledge of said sale to himself was

not communicated to your complainants at any time by said defendant, and that they only became aware of the same within ten days prior to the commencement of this action. That said defendant thus sold secretly to himself between one-half and two-thirds of their entire said merchandise, the exact amount of which they are unable to state and ask discovery by this Court. That said alleged sale to himself was accomplished by only one day's notice to the public by means of a small advertisement in a newspaper which said time and notice were grossly inadequate to obtain competitive bids. That in fact as your complainants are informed and believe and therefore charge the fact to be, that this defendant, their trustee, thus transferred to himself their said trust fund consisting of their said merchandise, without *bona fide* competitive bids therefor of any kind or nature whatever; and that upon said sale to himself clandestinely of their merchandise he credited himself and withheld from them upon his said final statement and settlement a sum amounting to 20% of his claimed consideration paid therefor, claiming the same unbeknown to them as commissions upon his own purchase. That said defendant was not entitled to said or any commissions [22] upon his said clandestine appropriation of their merchandise, and they ask and pray a return to them of said moneys so withheld in such sum as the Court shall find due.

\*       \*       \*       \*       \*       \*       \*

That said transfer to himself by their trustee was a gross fraud and imposition upon your complain-



ants who ask that said transfer be set aside and that their said trustee be charged with the full value of said trust fund, together with his profits thereon additional in such sum as the Court shall find due upon the accounting herein prayed, together with legal interest thereon from time of said sale.

JESSE OLNEY,

Solicitor and Counsel for Complainants.

United States of America,

Northern District of California,—ss.

Jesse Olney, being duly sworn, deposes and says:

I am the solicitor and counsel for the complainants in the foregoing Amendment to the First Amended Complaint.

I have read the Amendment to the First Amended Bill of Complaint and know the contents thereof, and that the same is true of my own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is not made by one of the complainants is that said complainants are all citizens of other states than the State of California and not within the Northern District of California wherein my office is situated; and for the further reason that the allegations of said Amendment to the First Amended Bill of Complaint are more within my own knowledge [23] than of the officers of the said corporations complainant.

JESSE OLNEY.





communicated to said plaintiffs at any time by said defendant; and denies that said plaintiffs only became aware of the same within ten days prior to the commencement of this action; and in this behalf defendant avers that the plaintiffs, and their agents and representatives knew of said sale on the 26th day of November, 1913; that said sale was made to said defendant with the full knowledge and consent of said plaintiffs, and the matter of said sale to said defendant was discussed with said plaintiffs prior to the making thereof.

Further answering said amendment that said defendant sold secretly to himself between one-half and two-thirds of the entire stock of merchandise, defendant denies the same and alleges that [25] all of the merchandise purchased by defendant was sold to himself with the full knowledge of said plaintiffs, and with their consent, and plaintiffs made no objection thereto until the 31st day of January, 1917, the date on which said amendment to said first amended bill of complaint was filed.

Further answering said amendment, defendant denies that the sale to defendant was accomplished without sufficient notice, or that the time and notice were grossly inadequate to obtain competitive bids; but, on the contrary, defendant avers the fact to be that there were competitive bids of *bona fide* bidders, and that defendant's was the highest bid therefor, the lowest bid being in the neighborhood of \$4,000.00; and defendant alleges that for more than three years last past the plaintiffs had full knowledge of said bidding, the manner of obtaining the bids and the

time of notice, and that said plaintiffs made no objection thereto; but on the contrary plaintiffs received the amount of defendant's bid on the 28th day of November, 1913, and have retained defendant's money and have not returned the same or offered to return the same.

Further answering said amendment defendant denies that defendant credited himself and withheld from the plaintiffs in his final statement and settlement, a sum amounting to twenty per cent of his claimed consideration paid therefor, claiming the same, unbeknown to said plaintiffs, was commission on his own purchase, and denies that said defendant was not entitled to said or any commissions for said purchase of his merchandise; and in this behalf defendant admits that he credited himself in his final statement rendered on the 26th day of November, 1913, with the amounts of said commissions; that he did openly claim to be entitled thereto; that his claim therefor was known to the plaintiffs and was allowed; that plaintiffs made no objection thereto of any kind or character, until the 31st day of January, 1917, [26] although they had full knowledge thereof for more than three years prior to that time.

For a further and separate defense, defendant avers that on the 26th day of November, 1913, an account was stated between the defendant and plaintiffs with respect to the transactions set out in the first amended bill and the amendment thereto; that on said date the plaintiffs and defendant came to an accounting together; that on such accounting defendant was found to be indebted to plaintiffs in the spe-

cified sum of \$1,049.81; that defendant paid the same to said plaintiffs, and that plaintiffs accepted the same and received their proportions thereof; that said account is set out in the amended bill of complaint herein, and that plaintiffs have kept said account for more than two and a half years without making any objections thereto, and particularly with respect to the item of commissions complained of in plaintiffs' said amendment to the bill, no objection was made to said item until the filing of said amendment, to wit, on the 31st day of January, 1917.

Further answering said amendment defendant avers that said amendment does not state any matter of equity entitling plaintiffs to the relief prayed for; that said amendment introduces a new cause of action; that there is no averment in said amendment why the knowledge of plaintiffs therein referred to was not obtained earlier; that no acts of diligence on the part of plaintiffs are therein shown; it appears upon the face of said amendment that the plaintiffs were and are guilty of laches; there is no averment excusing the delays on the part of plaintiffs, or showing the fraudulent concealment of any facts from plaintiffs, and no allegation showing why the alleged fraud was not discovered sooner, and there is no averment showing that by the exercise of ordinary diligence the discovery might not have been sooner made.

For a further and separate defense defendant alleges that [27] the alleged cause of action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of







[Endorsed]: Filed Feb. 7, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

(The amendment to the First Amended Complaint was filed by leave of Court during the course of the trial on the 31st day of January, 1917, and was not included in Complainants' Original Bill filed February 23, 1916, or in their Amended Bill filed March 29, 1916, or in their First Amended Bill filed May 4, 1916.) [29]

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(Title of Court and Cause.)

**Opinion.**

JESSE OLNEY, Esq., for Plaintiffs.

BERT SCHLESINGER, Esq., and LEON E. PRESCOTT, Esq., for the Defendant.

RUDKIN, District Judge.

This is a suit in equity for an accounting.

On the 11th day of August, 1913, the plaintiffs were insurers in varying amounts aggregating \$21,000 in all, on a stock of merchandise in the city of Seattle owned by one, Bridge, doing business under the name of A. Bridge & Co. On that date a fire occurred in the store building occupied by Bridge, causing a loss, the extent of which is a matter of dispute between the parties to the present controversy.

Soon after the loss occurred, Bridge made an assignment to one, Truax, a representative of the Seattle National Bank, for the benefit of his creditors, and negotiations were entered upon for the adjustment of the loss. In the course of these negotiations the plaintiffs were represented by one, Main,

and the insured and his assignee by one, Mason, as insurance adjusters. The adjuster, representing the insured and the assignee, claimed a loss of \$18,254.84, which was later reduced to \$17,000, and finally to \$16,200. The adjuster representing the plaintiffs conceded a loss of \$13,588.65, but refused to concede more. Being thus unable to agree upon the amount or extent of the loss, it was finally agreed between the assignee and the plaintiffs, that the sound value of the stock before the fire, was \$34,300, and that the plaintiffs would take over the stock at that figure. At the same time, and a part of the same transaction, it was agreed between Main and the defendant, that the defendant would put up a guarantee of \$18,100, and sell the stock for the benefit of the plaintiffs, receiving [30] for his services in that behalf a commission of twenty per cent on the gross amount realized on the sale. Pursuant to this arrangement, the defendant paid the guarantee of \$18,100 and the plaintiffs paid \$16,200, thus making up the sound value of \$34,300, and insuring the plaintiffs against any loss in excess of the \$16,200, claimed by the insured and his assignee.

Thereafter, a fire sale was conducted by the defendant at the old Bridge stand for a period of nineteen days, exclusive of Sundays. The gross proceeds of this sale, as reported by the defendant, was approximately \$18,000. At the expiration of this nineteen day period, the remainder of the stock was sold in bulk at private sale on sealed bids, ostensibly to one, Seynei, but in reality to Seynei and the defendant, who had formed a copartnership for the purpose of

taking over the stock. The amount realized on this sale in bulk was approximately \$11,000.

After the latter sale, the fire sale was continued at the same stand by the defendant and Seynei, for a period of about seven weeks, some new stock being added in the meantime.

On the 26th day of November, 1913, the defendant rendered the following statement to Main:

“STATEMENT.....Salvage of  
A. Bridge & Co. Clothing, furniture,  
shoes, not sales..... \$28,901.92

Expenses:

Rent .....	920.00	
Light .....	66.88	
Advertising .....	1204.21	
Clerk Hire.....	1655.21	
Materials .....	90.84	
Insurance .....	34.59	
Commission for handling		
at 20% on \$28,901.92..	5780.38	
Advanced as guaranty...	18100.00	27,852.11

Net Proceeds.....\$1,049.81.”

and enclosed the same together with a check in the following letter:

“I enclose herewith statement of A. Bridge & Co. [31] salvage, together with check for \$1049.81, to cover the net proceeds.

Trusting you will find the same correct and satisfactory.”

On December 8, 1913, Main wrote to the plaintiffs enclosing a copy of the report and stating:

"You will also find enclosed check covering this proportion. The total insurance on stock board was \$21,000. I am pleased that we are able to report a substantial salvage, although that is not as much as we had hoped for, but this is explained owing to the adverse conditions confronting Mr. Isaacs in disposing of the stock. However, the amount recovered is net gain over what we were able to close the loss with the assured through his adjuster, Mr. Mason, and, on the whole, satisfactory."

This money was retained by the plaintiffs, and nothing more was heard of the transaction until shortly before the institution of the present suit.

In the meantime, Seynei and the defendant became involved in litigation over their partnership affairs, and from certain disclosures made on the trial of that case, the plaintiffs concluded that they had been defrauded by the defendant, and demanded a further accounting. Such demand was not complied with, and the present suit followed.

Before discussing the facts, two preliminary questions of law should be disposed of. The plaintiffs contend, first, that Main as a mere insurance adjuster had no authority to represent or bind them; and second, that the burden is upon the defendant to render a full, true and correct account of his stewardship.

In support of the first proposition, my attention is directed to a provision of the Insurance Code of the State of Washington, defining the term "adjuster" or "insurance adjuster," and to a decision



of the Supreme Court of the State, construing that statute. I find no fault with that decision. Of course, a mere adjuster has not authority, express or implied, to bind [32] his principal. Like the ordinary claim agent, he can only investigate and report. But what are the facts here? Main employed the defendant, agreed upon his commission, agreed with the assignee of the insured to take over the stock of goods for \$34,300, consulted with the defendant as to the time and manner of sale, including the sale in bulk, and transmitted to the plaintiffs the statement of account received from the defendant. Manifestly he did not do any or all of these things as a mere adjuster, and yet his authority in that regard has never been questioned, and is not now questioned by the plaintiffs. Like any other agent, the authority of an adjuster lies in contract and he has such authority as the principal expressly confers, and such as the principal knowingly permits him to exercise without protest or objection. Within this rule, it seems to me there can be no question, but that the acts of Main were the acts of the plaintiffs themselves, and that his knowledge was their knowledge. If such is not the case, the plaintiffs were not represented at all, for admittedly they had no dealings with the defendant, except through Main.

The second proposition advanced by the plaintiffs is, of course, sound. But here an account was rendered, and acquiesced in for more than two years without question or protest. Under such circumstances the rule is changed and the burden is shifted



to the party challenging the correctness of the account to show error or fraud, and this by clear and satisfactory proof.

Eichel vs. Sawyer, 44 Fed. 853.

Porter vs. Price, 80 Fed. 656.

Charlotte Oil & Fertilizer Co. vs. Hartog, 85 ed. 150.

Allen West Commission Co. vs. Patello, 90 Fed. 629.

Now, what are the facts? The claim made by these plaintiffs is somewhat extravagant, to say the least. Their printed brief opens with the statement:

“This is a case in equity, against the trustee by his *cestui que trust* for an accounting of a sixty thousand dollar trust fund in his hands, consisting [33] of merchandise which has all been sold and disposed of by the trustee.”

The unusual claim on the part of the plaintiffs that they profited upwards of \$25,000 by this fire, finds some support in the testimony of Bridge, Seynei, Jeremy, and perhaps others. Bridge has an action pending in the courts of the State of Washington against his assignee to recover damages in the sum of \$100,000 for sacrificing his property. Seynei, according to his testimony, conspired with the defendant to defraud the plaintiffs, and later quarreled with his partner in iniquity over the spoils. Jeremy assisted in the preparation of a false and fictitious inventory to the same end.

These witnesses testified that the damage caused by the fire was only nominal, and that the fire in fact added twenty-five per cent to the value of the stock.

Such claim and such testimony do not appeal to me very strongly. The fact is not disputed that the assignee, for the benefit of the creditors, claimed a loss in the sum of \$16,200, and refused to accept an offer of upwards of \$13,000. The fact is not disputed that he was willing to accept \$34,300, as the sound value of the goods before the fire, which would, of course, include the value of the damaged stock and the claims against the plaintiffs. In his estimation, therefore, the value of the damaged stock was about \$18,000, and other parties concerned did not differ widely upon that question.

The claim against the defendant is three fold. First, that his expense account is excessive; second, that he has not accounted for moneys received during the fire sale; and third, the claim arising out of and by reason of the sale in bulk to Seynei and himself. The only testimony offered to impeach the expense account was the mere opinion of the witness, Seynei, that it seemed large. As against this, every item in the account seems to have been fairly and satisfactorily established. The [34] claim that moneys received by the defendant during the fire sale have not been accounted for, is sought to be established in this way: An inventory of the stock was taken immediately after the fire, showing the value to be approximately \$45,000 at cost price. A second inventory was taken at the close of the fire sale, showing the cost price of the balance of the stock to be approximately \$24,000. The first of these inventories was assumed to be correct without proof by all parties at the trial, and I do not understand that the

correctness of the second inventory is impuned, aside from the claim that the cost price of some of the goods, was marked down. A comparison of these two inventories shows, therefore, that the cost price of the goods sold during the nineteen days of the fire sale, was approximately \$20,000. Testimony was offered tending to show that these goods were sold at a considerable profit, probably twenty-five or thirty per cent above the cost price. If such were the case, it would seem clear that the sum realized during this period should be several thousand dollars in excess of the \$18,000 reported by the defendant. As against this, the defendant produced at the trial several thousand sale slips, showing the sales made during this period, the goods sold, and the amount received therefor. The aggregate amount received as shown by these sale slips is within a few dollars of the amount reported by the defendant, and if we add to the last inventory the goods sold, as disclosed by the sale slips, we will have approximately the goods shown by the first inventory. The sale slips are not impeached and inasmuch as practically all of the goods have been accounted for, the claim that a much larger sum was received does not seem to find support in the testimony. The plaintiffs, therefore, have failed to show that the account as rendered by the defendant is incorrect up to the time of the sale in bulk.

It will readily be conceded, of course, that a sale by an agent to himself is voidable at the option of the principal, [35] but it must likewise be conceded that he can sell to himself with the consent



of his principal just as readily as the principal can sell to him. The fact is clearly established in this case, that the matter of this sale to the defendant was discussed before the sale, and was known to Main, and the latter testified upon the trial that he deemed the offer a fair one at that time, and was of the same opinion still. It would seem idle, therefore, for the plaintiffs to claim that they can now set this sale aside after the lapse of more than three years. The utmost they can claim would be to call upon the defendant to account for the amount of his bid, namely, forty-five per cent of the cost price. There is some testimony before the Court tending to show that the cost price, as disclosed by the second inventory, was cut down materially for the purpose of reducing the amount of the bid, but for reasons already stated, I am not prepared to say that that fact has been established.

It seems to have been understood between the parties that the defendant was to have his commission on that sale as well as upon the others, and if the bid was put in to prevent a sacrifice, there would seem to be no injustice in allowing the commission. In any event, the fact that the commission was claimed and held out was known to Maine, and through him to the plaintiffs, and no complaint was made by reason thereof.

After a full examination of the accounts, a competent expert for the defendant testified that he was unable to find any evidence of dishonesty. He candidly admitted, however, that the business methods of the defendant were crude, and his accounts abom-

inable, and in that conclusion I fully agree. The defendant commingled trust funds with his own, and failed to keep such accounts as should be demanded of every trustee, but this alone does not prove fraud or mistake.

The plaintiffs declare that this suit involves not merely [36] the amount claimed, but the more important question, are they at the mercy of their adjusters and salvors. I can only say in answer to this that the business of every corporation is transacted through agents, and its success will depend upon the fidelity of these agents, and a proper supervision of the corporate affairs. And if these plaintiffs pursue, in the future, the course they have pursued in the past, the salvage end of their business will probably prove disastrous.

On the entire record, I can find no basis upon which a decree can be given in favor of the plaintiffs for any item or any sum, and the bill is accordingly dismissed.

[Endorsed]: Filed March 15, 1917. Walter B. Maling, Clerk. [37]



At a stated term, to wit, the March term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wednesday, the 21st day of March, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern Division of Washington, designated to hold and holding this court.

No. 253—EQUITY.

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONN., INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, SECURITY INSURANCE COMPANY OF NEW HAVEN,

Plaintiffs,

vs.

DAVID ISAACS,

Defendant.

**Decree.**

This cause coming on to be heard upon the issues raised by defendant's answers to the First Amended Bill of Complainants and their amendment thereto, and certain evidence, both oral and documentary, having been introduced, and said cause having been

submitted to the Court for consideration and decision and said Court having considered the same:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that complainants take nothing by their said action, and that their First Amended Bill of Complaint and the amendment thereto be and the same are hereby dismissed:

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the said defendant do have and recover of and from the said complainants his costs and disbursements in this suit, taxed at [38] \$——.

FRANK H. RUDKIN,  
Judge.

[Endorsed]: Filed and Entered March 21, 1917.  
Walter B. Maling, Clerk. By J. A. Schaertzer Deputy Clerk. [39]

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*In the United States District Court in and for the  
Southern Division of the Northern District of  
California, Second Division.*

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE COM-  
PANY et als.,

Complainants,

vs.

DAVID ISAACS,

Defendant.

**Statement of the Evidence.****Testimony of Harry C. Seynei, for Complainants.**

HARRY C. SEYNEI, called for the complainants, testified as follows:

I reside in the city of Seattle and State of Washington. At the time of the fire in the Bridge store I had been in the clothing business seventeen years; and had been manager and buyer for Mr. Bridge for the eleven years preceding the fire; and as manager knew perfectly the stock in every feature at the time of the fire. The nature of the stock was clothing, shoes, furnishings, and Alaska outfits. This stock before the fire was in first-class condition. About five months preceding the fire there had been a clearance sale of it and the odds and ends sold off and the stock generally cleaned up. After the clearance sale new stock came into the store; in round figures somewhere around \$20,000 of new stock. The stock was hardly damaged by the fire. Its retail value before the fire averaged about  $33\frac{1}{3}\%$  above its wholesale cost, making the stock of goods about \$60,000 in value. There was very little difference in the retail selling value before and after the fire. The actual damage to the stock by the fire did not exceed \$500. After the fire that stock of merchandise would sell quicker, to better advantage and you could get more for it than during a clearance sale. [40] In round figures the value of the stock after the fire in the hands of an expert like the defendant would not be any different than the original price before

(Testimony of Harry C. Seynei.)

the fire; the retail price value being something like \$60,000. On a fire sale, as a general rule, the percentage a stock is worth over an ordinary sale is about 20%; about 20% more than at regular sale. A fire sale speaks for itself.

I was thoroughly familiar with Bridge's method of buying. He was a close buyer. He only bought complete lines and at a very close figure. He discounted his bills and deducted this cash discount from the cost of his merchandise. He did not add the freight charges in setting down the cost of his merchandise. The cost as it stood on each article was net. I was familiar with the inventory taken after the fire (Plffs. Exhibit "C.") In that inventory amounting to \$45,954, the discount and freight paid by Bridge should still be added to obtain a correct valuation of the stock. Mr. Bridge was a successful man in business and had been in the business twenty-five years or over. I am thoroughly familiar with the manner in which Mr. Bridge was compelled to give up this large stock of merchandise and lose control over it. He was forced to appoint a trustee at the request of the Seattle National Bank, which was the largest creditor of the Bridge estate. Mr. Truax, the bank's vice-president, was appointed his assignee, and the settlement with the complainants, Bridge's insurers, was made by him as assignee for the creditors.

Mr. OLNEY.—Q. Has Mr. Bridge since sued this assignee for damages for sacrificing this stock?

Mr. SCHLESSINGER.—I object to that.



(Testimony of Harry C. Seynei.)

The COURT.—I do not see the relevancy of that; I sustain the objection.

Mr. OLNEY.—Q. From your intimate knowledge of that store of Mr. Bridge, and his stock of merchandise, and the location, customers and trade generally in Seattle, could Mr. Bridge, if he had been let alone, have taken that stock and sold it at fire sale and made a large profit?

Mr. SCHLESSINGER.—I object to that as immaterial, irrelevant and incompetent, and not binding upon the defendant.

The COURT.—I sustain the objection.

Mr. OLNEY.—Possibly I do not understand the mind of the Court.

The COURT.—What Mr. Bridge could clear is not material here. You have asked him as to the value of the goods and he has given it.

Mr. SEYNEI.—(Continuing.) I was employed to make this inventory in evidence here (Plffs. Ex. "C.") immediately after the fire by the Seattle National [41] Bank and Mr. Main. The inventory was made at cost prices and Mr. Jeremy and others assisted me. As far as I know everything was included in that inventory, including damaged goods. If anything was omitted it was not with my knowledge or intention. The Seattle National Bank also upon its taking had an accountant present who checked the invoices and the inventory. He checked up the inventory after it was taken by me and also the invoices of the merchandise to see that the inventory corresponded with the invoices.



(Testimony of Harry C. Seynei.)

I first met the defendant about three or four days after the fire; and he employed me to assist him in conducting his sale for the complainants of this Bridge stock. This sale for the companies was conducted entirely in the Bridge store at the same location as Bridge conducted his business before the fire. The goods at this sale were sold over the counter at retail exclusively. I know of no sales in bulk of that insurance stock except the final one to the defendant.

After the fire the store was closed and the merchandise thoroughly sorted out under the direction of Mr. Main to preserve and take care of the stock in the best manner for the insurance companies, the inventory being taken at that time. It took two weeks to take the inventory (Plffs. Ex. "C.") I was in full charge of the marking of the merchandise for the insurance sale and directed how they should be marked. They were marked on an average 20% above the inventory wholesale cost. There was nothing marked below the original cost price except a few of the slightly damaged goods and also some things like Arrow Brand collars that were used as leaders in the windows to attract the public. This percentage marked below was very little and they were inconsequential. These prices after they were marked were not cut at all during the insurance sale. Some were raised, such as shoes, overalls and collars. Some collars were damaged, some were not. We used them to attract the public; they were not below; they were raised at request of the Arrow Brand

(Testimony of Harry C. Seynei.)

people two days after the sale opened. These sale prices were easily discernible on the tags and were marked in red pencil for the insurance sale. For instance, on these tags (Plffs. Exhibits 1) [42] this one, the cost price is \$5.75; the retail selling price for the insurance fire sale \$8.90; and it was sold at that price. Here is another. This is a suit. Its cost price was \$9.50; and it sold for \$12.75. It sold at the latter price upon the fire sale. Here is another. This cost \$7.75 and was sold for \$12.50. Here is another. This cost \$8.50 and sold for \$11.75. Here is another. This cost \$11.50 and sold for \$13.50. And another. This cost \$7, and sold for \$10. And another. This cost \$10.50 and sold for \$12.75. Here is another. This cost \$5, and sold for \$8.50 upon the insurance sale.

Mr. OLNEY.—Do these tags which I have shown you, and which have been offered in evidence here, represent a fair average of the prices that the merchandise upon that three weeks fire sale for these complainants by this defendant brought?

Mr. SCHLESSINGER.—Objected to as irrelevant, immaterial and incompetent.

The COURT.—My recollection is that the witness has already testified they were marked up 20% from the cost price, has he not?

Mr. OLNEY.—Yes.

The COURT.—I will sustain the objection.

Mr. SEYNEI.—(Continuing.) This insurance sale of three weeks was a successful sale and conducted as a fire sale. The first few days it was ad-

(Testimony of Harry C. Seynei.)

vertised very heavily; but afterwards did not require much advertising. During the sale it was at times necessary to close the doors. The clerks were all kept busy. To the best of my knowledge about one-quarter of the entire inventory was sold at that fire sale.

The defendant remarked it was a very successful sale, and that he had made good. He made that statement at various times in my hearing. Towards the close of the sale with regard to the amount of money he had taken in with reference to his guarantee and expenses, he said he had made his guarantee above his expenses. That was three days before the close of the sale. He said he made his guarantee good above all expenses. Some of these conversations occurred in the presence of Mr. Bailey. Mr. Jeremy was our next best man and I think he was once or twice present during these conversations. The defendant made also these statements to Mr. Main, if I am not mistaken, and also to several travelling men. [43]

I never saw any books kept by the defendant on that sale. I handled the sale for him and would have had knowledge if any books were kept, but I did not see any books.

The sales tags were taken possession of by the defendant every evening, and by his wife and daughter. Mrs. Isaacs was present at that time and took the sales tags and charged them up.

Sales slips were not made at all times during that sale of every article. During the rush days we had

(Testimony of Harry C. Seynei.)

no time to make out sales slips; we gave orders to all the clerks at that time to bring the goods to the desk and they were checked up when the wrapper charged them up; we could not possibly take time to make slips for all the sales made at that time.

The defendant's cash register was out of order and was not used as a cash register but as a cash drawer to make change so that there were no tickets to the cash register. Although I managed that sale I never saw any cash register or adding machine totals of the money taken in. The cashier's department was entirely in the hands of the defendant's own family. Every evening the defendant took across the street the cash from the sale over to Mr. Aronson's, a wholesale liquor place, and put it there over night for safekeeping until the next morning. I asked Mr. Aronson as a favor to let defendant use his safe; that is as far as I know what became of the cash. The defendant thus had a safe place to keep the cash without the employment of a safe deposit box. There was no necessity for him to hire a safe deposit box.

The first day of that insurance sale there were thirty or thirty-five clerks employed. Towards the end of the sale these were reduced to about fifteen in all; ten men and five ladies. The average amount paid the clerks was \$15 and up a week for the men, and \$9 to \$12 for the ladies. The defendant's statement to the complainants (Plffs. Ex. "2-q") charging up some \$1,665, or \$551 a week clerk hire against them looks to me as an exorbitant amount for clerk



(Testimony of Harry C. Seynei.)

hire. To the best of my knowledge there could not have been more than \$800 paid out for clerk hire; there was only one or two days they had extra help and they were [44] not expensive help; they did not require expensive help for that sale.

After the insurance sale for these complainants closed, I continued the sale of this stock for the partnership of H. C. Seynei & Co., and our partnership sale lasted seven (7) weeks, four weeks longer than the insurance sale. This partnership sale was conducted at the same location, same rent, and same advertising; same place and everything.

Mr. OLNEY.—What was your clerk hire during that time?

Mr. SCHLESSINGER.—I object to that as immaterial, irrelevant, and incompetent.

The COURT.—I will sustain the objection.

Mr. SEYNEI.—(Continuing.) The defendant paid the clerks personally their wages that I know of out of the cash drawer on the insurance sale in cash. So this money paid for clerk hire was never banked. The defendant never took receipts from the clerks for their wages on this sale he conducted for the complaints; but later on, after that sale was ended and I continued the sale with the balance of the stock for the account of Isaacs and myself, he insisted on my taking receipts from the clerks as vouchers to show him. In other words, when he was representing somebody else he did not take them, but when he was representing himself he was very careful to see



(Testimony of Harry C. Seynei.)

no documents went astray; he had a daily report from me every day.

Mr. OLNEY.—What else were you compelled to give Mr. Isaacs when you were conducting the sale of H. C. Seynei & Co.?

Mr. SCHLESSINGER.—I object to that as immaterial.

The COURT.—I sustain the objection.

Mr. SEYNEI.—(Continuing.) I first talked with the defendant about forming a partnership about four or five days after the insurance sale commenced; maybe four days; somewhere about there. He broached the subject to me. He said he wanted to get through as quick as possible with these complainants sale and make his guaranty good and then he should buy the stock for himself and put me in the business in the same location; he would buy the stock in my name and put me in the business, and take [45] me in as a partner; I to conduct the business at the same location under the name Harry Seynei & Co. About the end of the last week of the insurance sale the defendant told me he had made his guaranty good and might as well close it; that he would have to take an inventory, and make a showing he was not the bidder for it, and to lump it off, and he would advance the money and buy it in my name. He told me to submit a bid and when I should submit my bid after the other people had made their bids. And he accepted it.

Shortly afterwards the same week the defendant closed the sale at retail for these complainants; and laid the best goods aside up in the balcony; and the

(Testimony of Harry C. Seynei.)

remainder of the merchandise was tied up in bundles to make it look as discreditable as possible; that is to make them look as cheap as possible; so that they would not look as good as when they were opened up or hung up as merchants would do. This was done on Sunday before the sale in bulk on Monday.

The merchandise so laid away was the best part of the clothing, and that means suits and overcoats, mackintoshes and some shoes. It might be \$5,000 worth and it might be more than that. This was some of the best merchandise in the stock at the time and was not opened to bidders in the sale in bulk. They were afterwards taken down and used in the partnership sale; they were taken from the balcony and placed downstairs and opened for sale. I took the second inventory but I do not know whether the goods that had been placed by Mr. Isaacs in the balcony were included in this inventory or not.

Regarding the offering of the complainants' merchandise in bulk for sale under sealed bids the defendant said he did not want Mr. Main to know he was the owner of this stock; that he had to publish it in the paper that this would be sold in bulk and that it would be opened for bids on Monday afternoon at three o'clock; but that stock was sold, that is supposed to have been sold, to me in my name before noon on Monday. The defendant stated the reason he did not want his own name to appear was that he did not want Mr. Main and the insurance companies to [46] know he was actually the owner of the Stock.

(Testimony of Harry C. Seynei.)

He used my name on the sale, the bid being placed in my name. This is a copy of the bid (Plffs. Ex. 2); the defendant dictated that himself in my presence to the stenographer, and I gave it back to him after I signed it.

The defendant's statement to the complainants that the highest bid was 45% of the cost was false; the highest bid was 47%; the fact is this bid in his hands was two per cent more. Although my name was used the defendant was the actual purchaser; he bought the stock. I did not have eleven thousand dollars to pay for this stock at that time.

The defendant purchased these goods in bulk for himself from the complainants for \$8,075 net, and then sold them to our partnership for \$11,094 and that amount was charged to our partnership on the books of H. C. Seynei & Co. afterwards opened; my books show that was the amount. The defendant thus made a personal profit of over two thousand dollars for himself.

The defendant made arrangements with me looking to the elimination of competition for that sale in bulk. He asked me to speak to my friends who had known me in Seattle not to interfere, so I would get the stock.

The defendant's sale for the complainants closed on a Saturday night and the next day a small ad was placed in the "Seattle Times" in the want ad column. That ad appeared in the "Seattle Times" of September 28th, 1913, on page 9. This is the ad (Plffs. Ex. "B."):

(Testimony of Harry C. Seynei.)

“The balance of the A. Bridge & Co., 103-05 First Ave., Seattle will be offered for bids Monday, Sept. 29, at 3 P. M. Coast Fire & Marine Insurance Co. D. Isaacs. Manager.”

That is the ad the defendant wrote and I took it up and the “Seattle Times” published it.

I was in the store at all times during the insurance sale and I did not see any people there examining the stock for the purpose of making a bid. [47]

I do not know of anyone sending in bids at that time; no one at the sale in bulk.

After the fire sale and before the sale in bulk, the defendant took an inventory of the remaining stock of merchandise. This was taken on Sunday. This inventory was taken while the defendant was there with his wife and daughter; and I was present part of the time. I helped considerably in the taking of that inventory (Plffs. Ex. 4).

Q. Is this that inventory? A. Yes.

Mr. OLNEY.—We offer the same.

The COURT.—It will be admitted.

Mr. OLNEY.—Was that inventory taken at Bridge cost prices?

A. It was taken the same as it was taken for the insurance sale, except that Mr. Isaacs took some suits tied up in bundles, suits which cost as much as \$15 wholesale and mixed them in the \$9 pile, lumped them off, and made them \$9.50 or \$9.

Q. Then it was not taken at Bridge cost prices?

A. I said a while ago he mixed them up.

Q. As I understand, then, for the purpose of this



(Testimony of Harry C. Seynei.)

inventory, the higher priced goods were taken and wrapped up in bundles and tied up and marked at a very lower price?

A. It was mixed up with the cheaper stuff, so many suits at \$9, mixed with the higher priced stuff.

Q. So that that depreciated the inventory so much?

A. Yes, the clothing was depreciated very much.

Q. How much did that depreciation run?

Mr. SCHLESSINGER.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—He may answer subject to the objection.

A. It was considerable.

Q. About how much? You must know?

A. The inventory plainly shows the amount of suits taken at \$9.50 for the insurance company after the three weeks successful sale, and the amount of suits taken after the sale—the fire sale at \$9.50, left in the remainder of the stock shows there must have been at least \$3,000, or \$4,000, maybe more, maybe \$5,000, mixed up—that is, the higher prices mixed up with the cheaper, and he reduced it by keeping them tied up in the cheaper merchandise.

The COURT.—\$4,000 or \$5,000 in all?

A. Yes; that means in the lower cost.

Mr. OLNEY.—He had the price lowered in that way?

Mr. SCHLESSINGER.—I object to that as immaterial, irrelevant and incompetent.



(Testimony of Harry C. Seynei.)

The COURT.—I will admit it subject to the objection.

A. Mr. Isaacs himself dictated the inventory; he took the figures down.

Q. What did Mr. Isaacs say to you in reference to the depreciation of this inventory?

A. He naturally wanted it to look as low as possible.

The COURT.—The question is what did he say, if anything?

A. Mr. Isaacs said he did not want Mr. Main to know how much stock there was left on the premises.

Mr. OLNEY.—Q. What was the purpose of taking that inventory?

Mr. SCHLESSINGER.—I object to that as calling for the conclusion of the witness, and immaterial.

The COURT.—I sustain the objection unless he knows.

Mr. OLNEY.—He was a partner of Mr. Isaacs.  
[48]

A. The purpose of taking it was for him and me to become partners in the business.

Q. I want you to state, Mr. Seynei, the conversation that you had with him, and what he said to you.

A. He wanted to show his bid was highest, and make it look as though he bid as much as the stock was worth.

Q. Have you stated all the conversation that you had with Mr. Isaacs in reference to depreciation of this inventory, and statements by him as to why he

(Testimony of Harry C. Seynei.)

depreciated the inventory?

A. I think I have answered plain enough that he wanted the stock for himself, and had depreciated it as much as possible so he would not have to account for it.

Q. He said that to you?

A. Yes. I think I made it plain enough a while ago.

Mr. SEYNEI (Continuing).—This second inventory (Plffs. Ex. 4) was made for the purpose of the sale in bulk.

After the sale in bulk by the defendant to himself these prices which had been so depreciated and lowered were raised and the merchandise sold for more money than it was taken in the depreciated inventory for.

I was the resident partner of the defendant in the city of Seattle after the sale in bulk to himself and as such continued the sale there of that merchandise and had charge of the keeping of the partnership books of H. C. Seynei & Co. for that sale. The sale opened up the first week in October in the same building, on the same premises, in the same location, and ran seven weeks. The same selling prices were left on the Bridge merchandise upon that sale as upon the insurance sale and the stock was sold on that price. I had full charge of the sale and was the resident partner. The defendant was not there during the sale. The amount of new merchandise purchased by the partnership during that sale was \$6,000. I purchased it. It was merchandise to fill

(Testimony of Harry C. Seynei.)

in short lines of certain special departments. The merchandise so purchased was about one-fourth or less than the entire stock of Seynei & Co. on the partnership sale. The inventory (Plffs. Ex. 4) was \$24,600. There was about \$500 of new clothing purchased to reinstate the entire partnership stock such as trousers and raincoats and mackintoshes.

The clothing at all times both at the insurance and partnership sales represented one-half the entire stock. When we opened our partnership books of H. C. Seynei & Co., it inventoried half the entire stock. [49] The clothing therefore on the sale of H. C. Seynei & Co. was practically all the original Bridge stock.

At the sale conducted by me for H. C. Seynei & Co. the total sales amounted to over \$16,000. Sales of new stock were about \$1,500.

At the close of the seven weeks during which the partnership sale of H. C. Seynei & Co. ran, the defendant and I took an inventory of the balance of the stock remaining. These two books are that inventory. (Plffs. Ex. 8.) This statement (Plffs. Ex. 9) taken from this Third Inventory showing \$16,633.57 as the final amount of merchandise remaining at the time the stock was placed in the warehouse is a correct statement taken by my bookkeeper from the books. It is a recapitulation of this Third Inventory. This Statement of \$16,633.57 deducted from the total merchandise on hand, as shown by the partnership books of H. C. Seynei & Co., of \$30,917, leaves a balance remaining of \$14,283 of merchan-

(Testimony of Harry C. Seynei.)

dise; and if the Seynei books show this \$14,283 of merchandise sold for \$16,067.94, it leaves a profit of \$1,700; a little over that at the Seynei sale.

I have testified that one-quarter of the new stock was sold for \$1,565, at one-third profit, or approximately a profit of \$521; and by deducting that from the total profit of \$1,784 you find the profit on the Bridge stock alone, about 10% profit on the remainder of the stock; about \$1,200. Thus the Bridge stock on the Seynei sale sold for \$1,264 more than its inventoried cost price; which is about 10% above cost.

The merchandise at the insurance sale did not sell 20% below cost as claimed by Mr. Isaacs.

The defendant's interest in our partnership was never made known to the general public. It was at all times a secret sale; a secret partnership. This secrecy was compelled by the defendant. The reason he gave was that he did not care to have Mr. Main know anything about it, that he was the owner of that stock. So my name was used individually. The name of H. C. Seynei & Co. was never publicly used. I advertised in [50] the public papers. These are the advertisements (Plffs. Exs. 11, 13, 14, 15).

With reference to these books of H. C. Seynei & Co. which are in evidence, the defendant directed their opening and was explicit as to how they should be kept in detail. It was at his direction that the merchandise sold in bulk to himself was debited in the ledger (Plffs. Ex. 7) at pages 4, 6, 8, 10, 12, 13,



(Testimony of Harry C. Seynei.)

14, 16, with the full amount of the inventory, \$24,600.

The defendant charged the partnership \$11,094 for that Bridge stock; and that sum was placed upon the books as a credit to him at that time, and the firm of H. C. Seynei & Co. was charged on the books with merchandise at the value of \$24,600. This merchandise was entirely the original Bridge stock.

The sale in bulk of this stock occurred on a Monday morning and on that evening I had a conversation with him at the Hotel Herald in Seattle. At that time and in that conversation I went over with him the amount of the merchandise which had been purchased for the firm business. These two sheets of paper (Plffs. Ex. 16) upon the Hotel Herald stationery, were made out by the defendant at that time in his own handwriting. They show in his own handwriting what the merchandise was worth, what was to be charged up to me, how much to account for: on the other side the departments are specified, the individual departments such as Clothing Department No. 1 to Department 8. These are all in his own handwriting. At the time he made out that paper he said to me the stock was actually worth the amount of money written on that paper; and he figured the stock to us was worth \$24,600; and that I should account to him for every dollar received for that stock; and new goods I continued to buy in conducting that business.

The defendant spoke at the time of the profit, about \$13,000 he made on the transaction of the sale in bulk at that time and said he had made a success-



(Testimony of Harry C. Seynei.)

ful purchase from the complainants; that there [51] was no reason why I should not make a success of that stock; that I had the best of it, to his knowledge; and that the merchandise was actually worth the amount of the inventory—one hundred cents on the dollar.

**Cross-examination.**

I did not see Mr. Main there at any time upon the taking of the inventory. I do not know the amount of the damage to the stock as estimated by Mr. Truax or the Seattle National Bank, the assignee of Mr. Bridge. My judgment of the damage was \$500. Mr. Bridge claimed to have had a very heavy damage by smoke but he didn't know the exact amount. It was not \$18,000 or thereabouts. I am unable to recall the sound value of these goods before the fire. The sound value agreed upon between the assignee and the adjuster was never satisfactory to Mr. Bridge. I don't know what agreement the adjuster had with Mr. Bridge or how far they agreed upon the amount of the loss. The only thing that was ever fixed by me was the actual inventory, which I turned over.

Mr. OLNEY.—We object to all this. It is merely hearsay.

Mr. SEYNEI.—(Continuing.) Isaacs realized more than \$28,901.92 from the sales at retail and the sale in bulk. There was \$48,000 invested in that stock before the fire and the sound value of that stock to my knowledge at wholesale prices was one hundred cents on the dollar.

(Testimony of Harry C. Seynei.)

At the retail sale I engaged the clerks. I have no reason to question their integrity, then or now. The clerks made out the sales slips in the usual custom showing amounts and items. The sales slips were numbered serially; one was given to the customer, the other the cashier retained. This was done except instances when we were too busy to make out the sales slips.

On the sale for the complainants, the retail sale, the cashier was Mr. Isaacs, Mrs. Isaacs and Miss Isaacs.

I was not interested in the profits of that sale. My interest was to make it a success. I was under a salary at the time. [52]

Isaacs talked with me about forming a partnership three or four days after the insurance retail sale started for the purpose of conducting a retail concern with the remnants and also by replenishing the stock. I contributed no money to that partnership. All that I was to contribute was my credit. I was present when the sale in bulk occurred.

Mr. SCHLESSINGER.—Now, there has been some suggestion made here—I say “suggestion”—that Mr. Isaacs bid in that stuff clandestinely. Were you present when these bids were opened?

A. What bids?

Q. The bids for the remnant stock, the tail end of the stock? A. There were no bids.

Q. (Intg.) Were you present when that sale occurred? A. Yes.

(Testimony of Harry C. Seynei.)

Q. Were there any other persons present bidding on that stock?

A. There were three, if I remember, but they were not exactly bidding.

Q. Did any other persons file bids for that stock?

A. There were no bids.

Q. I am asking what the fact is, did any other person file bids, papers, letters or documents showing how much they would buy that stock for?

A. Yes, there were some.

Q. How many?

A. To my knowledge there were two or three.

Q. Only two or three?

A. Not any more than that.

Q. Did you know the two or three who filed bids?

A. Yes.

Q. What are their names?

A. Mr. SCHIRMER.—(Witness continuing.) He is a merchant of good standing. I did not see his figure. He did not make any offer of money that I know of, and I have never heard that he offered \$4,000. There was some offer made. He did not bid for it. The other two persons were friends of Mr. Isaacs living in Seattle. Those men did not bid.

Mr. SEYNEI.—(Continuing.) I was in the store on that morning until noontime and did not see any of those men present. Those men had no opportunity to make an examination and did not make any examination of that stock.

Mr. Isaacs paid \$920 rent for one month. I do not know the amount of the light bill during that period.

(Testimony of Harry C. Seynei.)

The sum of \$1204.21 for advertising may be correct. In the defendant's statement of expenses the item of clerk hire looks very heavy.

Q. Are you able to estimate of your own knowledge the actual amount of money which these various clerks earned and the actual amount of money which they received at the hands of the defendant?

A. Only basing it on the figures of the same clerks I hired, from 10 to 15, and basing it on figures he did, it shows he had considerable more than I did.

Q. As a matter of fact you have not by either talking with these clerks or in any other way calculated the amount actually paid them by Mr. Isaacs?

A. No, I cannot so state. [53]

Q. Mr. Isaacs, and of this there can be no question, purchased the tail-end of this stock?

A. You might call it the tail-end, yes.

Q. Do you know how the sales toward the conclusion, toward the end of the sale, along about the nineteenth day,—do you know how the receipts of that day compared with the previous days' receipts?

A. Naturally they would not be as big as the first day.

Q. In other words, as the days went by the receipts—

A. (Ing.) The receipts varied on different days.

Q. That is customary, is it not?

A. In every fire sale.

Q. In every fire sale?

A. Yes; it varies on different days; some days



(Testimony of Harry C. Seynei.)

more and some days less; but the sale was progressing just the same.

Q. But with diminished receipts?

A. It was not what you call diminished; it was not as big as the first day.

Q. Now, then, it became necessary that the goods should be sold in bulk?      A. Not necessary, no.

Q. They were sold in bulk, were they not?

A. Yes.

Q. You had an interest in that stock?      A. No.

Q. It belonged to the insurance companies and Mr. Isaacs?      A. Yes.

Q. At that time, just a few days before the sale in bulk to Mr. Isaacs, you and he had practically agreed upon a partnership had you not, as you stated?      A. How many days?

Q. A few days before?

A. Some time before that, yes.

Q. As a matter of fact a partnership agreement had been drawn between you but not signed; isn't that true?      A. Yes.

Q. These goods having been purchased by Mr. Isaacs,—and by the way there was a bid put in there for that stock of goods, was there not?

A. Mr. Isaacs put in the bid.

Q. With your knowledge?

A. He told me how much to put in the bid for.

Q. It was put in in the name of Seynei & Co.?

A. No.

Q. In the name of Harry Seynei?

A. Correct.



(Testimony of Harry C. Seynei.)

Q. After that was the store closed down for a few days?     A. I closed it down.

Q. You closed the store down?     A. Yes.

Q. And you took an inventory, did you not?

A. An inventory was taken before *that time*.

Q. Then when you next opened the store it was in the name of Harry Seynei?     A. Yes.

Q. Your name was put over the door?     A. Yes.

Q. The same stand where you had been employed for nearly a dozen years?     A. Yes, sir.

Q. And where you were very well known and favorably known?     A. Yes.

Q. Now, did you add to that stock any?

A. Yes, just a little.

Q. Who made those purchases?     A. I did.

Q. Who paid for them?

A. The firm of Seynei & Company.

Q. But you did add to the stock?

A. Yes; not all at one time, but a little from time to time.

Q. As you needed stock you replenished it?

A. Yes.

Q. Do you recall how much stock you had on hand there, eliminating the \$11,000—how much new stock you bought when you opened your doors?

A. I don't think it would exceed \$300 or \$400 in the beginning.

Q. How much new stock did you *but* altogether, approximately?     A. \$6,000.

Q. Do you know how much Mr. Isaacs purchased that stock for?

(Testimony of Harry C. Seynei.)

A. \$11,094. He told me how to put it in.

Q. Did you know he had advanced the insurance company as a guarantee in cash the sum of \$18,100?

A. That is what I am told, yes.

Q. You referred to some concealment of Mr. Isaacs' connection with that business. Did you and Mr. Isaacs discuss the advisability of your conducting [54] that business in your name?

A. Well, Mr. Isaacs said he wanted to conduct it in my name exclusively.

Q. Was there any reason stated for that?

A. He didn't want the insurance companies to know he owned that stock.

Q. Is it not a fact that the insurance company not only knew that he owned the stock, but knew what he had paid for that stock, didn't you know it?

A. No.

Q. Did you know Mr. Main, the adjuster?

A. Yes.

Q. Did you talk with Mr. Main about the amount of money Mr. Isaacs paid for that stock?

A. No, I did not.

Q. You know George C. Main, do you?

A. Yes, I do.

Q. Were you present when Mr. Isaacs' bid was opened? A. Yes.

Q. Were you present when other bids were opened?

A. As I said awhile ago, I didn't know of any other bids.

Q. Were you present when any other persons were

(Testimony of Harry C. Seynei.)

present there offering to buy that stock?

A. There were three gentlemen there, as I recall.

Q. Were you present when there was a bid opened for \$10,000? A. No.

Q. Were you present when there was a bid opened of \$4,000? A. I didn't see those bids.

Q. Do you know Mr. Seynei that Mr. Isaacs bought that stock in your name pursuant to an understanding had with the adjuster, Mr. George C. Main? A. No.

Q. Do you know that he and Mr. Main agreed that in order that the stock should bring the highest possible sum that he would bid for it himself?

A. No.

Q. Do you not know that his bid was the largest bid?

A. There were no bids made, as far as I know, except his own bid.

Q. Do you know a Mr. Colsky?

A. I have heard of the gentleman.

Q. How long have you known him?

A. I have known him by name for several years.

Q. Is he a business man in Seattle?

A. He is a salvage man.

Q. Did you see him on that Monday? A. No.

Q. Did you ever see him examine that stock in that store?

A. The only time I ever saw Mr. Colsky looking over the stock was previous to the adjustment of Mr. Main.

Q. Will you say whether or not he bid on that

(Testimony of Harry C. Seynei.)

stock of your own knowledge?     A. He did not bid.

Q. Do you know a man named Samuel Cohen?

A. No.

Q. Do you know a man named Gerber?

A. I know him by name.

Q. What is his business?

A. He is a real estate broker.

Q. Was he ever in the men's furnishing goods business?     A. Not as far as I know of.

Q. Does he live in Seattle?     A. Yes.

Q. You did not see him there?     A. No, indeed not.

Q. Do you know a Mr. H. Kessler?     A. Yes.

Q. Does he live in the city of Seattle?

A. Yes.

Q. Is he a business man?     A. Yes.

Q. Did he file a bid?     A. He did not.

Q. Did he examine the stock?

A. No, I never saw him in the house.

Q. You never saw him in the house?     A. No.

Q. Do you know a man named Morris Butnick?

A. I have heard of him.

Q. Is he a business man in Seattle?

A. He was in Seattle.

Q. Do you know whether he bid on this stock?

A. The only time he bid for stock was after my conducting of the sale of seven weeks, just on the shoes.

Q. What is the fact, did he bid or did he not bid?

A. Not on this stock, no.

A. He never bid for this stock?

A. Not for this stock of the insurance company.



Q. Do you recall Mr. Seynei how much the insurance companies offered to settle their losses for?

A. I have no knowledge of it, no.     [55]

Q. Do you recall that Mr. Bridge claimed a loss of \$18,100, and the adjuster offered to settle for \$16,200?

A. I don't know as to that.

Q. Did you ever talk with Mr. Main on the subject of Mr. Isaacs bid for the remnant stock?

A. I never discussed it with him.

Q. Did he not state to you that he considered Mr. Isaacs' bid very fair?

A. I said I never discussed the bid with Mr. Main at all; I don't know anything about it.

Q. Never talked with him?     A. No.

Q. You have never been engaged in the salvage business?     A. No.

A. Your work has been confined to selling goods in a usual way in a retail store?

A. Buying and wholesale and retail.

Q. And I take it in a word to summarize your testimony you have no personal knowledge of any of the items involved in this account, of your own knowledge, have you?     A. What account?

Q. In the statement rendered by Mr. Isaacs to the insurance company?

The COURT.—He said that the rent was correct but outside of that he didn't know anything about it.

#### Redirect Examination.

Mr. OLNEY.—Q. Mr. Seynei, you spoke of new stock being purchased on the Seynei sale, some \$6,000?     A. Yes.



(Testimony of Harry C. Seynei.)

Q. I think you said that only about one-quarter of that stock was sold?     A. Yes.

Q. What was done with the three-quarters of that new stock that was not sold?

Mr. SCHLESSINGER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—I suppose the balance of the stock was shipped to San Francisco?

Mr. SCHLESSINGER.—Certainly.

Mr. OLNEY.—If that is admitted that is all.

HARRY C. SEYNEI, recalled.

The firm name in the partnership agreement was to be H. C. Seynei & Co., but the business to be conducted under the name Harry Seynei. The agreement was David Isaacs and H. C. Seynei; but the partnership was to be conducted under the name of H. C. Seynei & Co.

Mr. OLNEY.—Q. Mr. Seynei, there is one question I omitted to ask you yesterday. On the former trial in this court regarding this partnership which has been referred to, the case of Seynei v. Isaacs, Equity Cause 83, in this court: Did you testify on the stand at that time substantially as you have testified in this trial? I will ask you whether upon that trial you testified that the merchandise sold upon the insurance fire sale by this defendant brought from 20 to 25 % above the inventory cost price?

A. I did so.

**Testimony of John Jeremy, for the Complainants.**

JOHN JEREMY, called for the complainants, testified as follows:

I am merchandise man for the McCormack Bros. stores in Seattle and Tacoma, Wash. I have been nearly twenty-two years in general merchandise and have handled the best and poorest in the world during those twenty-two years. During that time I have been engaged in London, England, Canada, Manchester, England, Tacoma and Seattle. My connection was always as salesman.

I was employed in the store of A. Bridge in the city of Seattle before the fire there in August, 1913. I came there about March that same year. I assisted Mr. Saynei in overseeing the buying. I picked out my patterns and he did the buying, and I was still in that employment at the time of that fire in the Bridge store and continued to be employed right along there [56] after the fire by the defendant who was acting for the insurance companies. Then after this sale for the companies I was employed in the sale of the balance of the Bridge stock by the firm of H. C. Seynei & Co. So, I have a thorough knowledge of that stock of merchandise from the period commencing some five months before the fire.

I assisted in taking this inventory, Plffs. Ex. "C," in August, 1913, in Seattle, immediately after the Bridge fire there. Absolutely everything was included in that inventory. In my opinion that inventory is just and correct. The same cost prices

(Testimony of John Jeremy.)

that were on the tags were put in that inventory absolutely.

Mr. Bridge, the owner, was a close buyer. He was a shrewd business man.

From my personal knowledge of that stock of merchandise I would say that stock would fetch more after the fire than before. The stock was worth more after the fire than before, because you make a big drawing by a fire sale. In my opinion the value of that stock immediately after the fire was twenty-five per cent increase over the original cost price.

The actual damage caused by the fire was between \$500 and \$600. The goods in the store were all arranged on racks and show cases. There were just two of these tables damaged by the fire.

I was familiar with the Bridge cost marks by which the merchandise was marked. It was Buckingham. It remained on that stock of merchandise during the insurance sale by the defendant. The marks for that insurance sale were made under the defendant's direction. We put a red mark on all tickets. All were similarly marked so that anyone looking at the original Bridge cost marks could easily see the present selling prices. These selling prices on that sale for the complainants were marked about 25% above the original Bridge cost prices and the merchandise was absolutely sold at those selling prices. We all had instructions before that sale opened how the stock should be sold. Everything was marked with plain figures and was to be absolutely sold at that price. I should say three-

(Testimony of John Jeremy.)

quarters of the stock on that insurance sale was so marked above the [57] Bridge cost price. The defendant and Mr. Seynei gave instructions as to how the merchandise should be marked on that sale. These were, to mark them up 25% above the Bridge cost price, and we did so; and they were so sold as they were marked.

I marked the clothing myself personally. I had charge of all the clothing, which represented the biggest part of the stock. I made a slip for everything I sold, even during the busy times; what was the custom generally I do not know. In a general way I was familiar also with the way in which merchandise was marked on that insurance sale in the other departments as to being above or below the original Bridge inventoried cost. It was all marked above Bridge's cost with the exception of that which is absolutely burned, which, as I testified, was not over \$500 or \$600.

Some months before the fire while I was employed in the store there had been a clean-up sale of odds and ends of that stock conducted by a Mr. Burk. I was there *there* the last two days of it. After that clearance sale new stock came into the store, between \$20,000 and \$22,000 worth. There was considerable new goods in the store after the fire.

No stock on that insurance sale was sold at whole-sale.

During the course of the complainants' sale I had conversations with the defendant at which he said it was going fine, keep it up, we are on velvet.



(Testimony of John Jeremy.)

The first few days this insurance sale was much advertised. Maybe on overalls the prices were raised; the first few days we sold them at so low a price you could not get them unless you replenished the stock. The merchandise sold rapidly. There were six clerks in the clothing the first couple of days and we averaged about \$250, apiece all around. During that three weeks of the insurance sale about one-half of all the clothing was sold. [58]

Those three weeks of the insurance sale we were paid in cash but gave no receipts. I worked later for the firm of H. C. Seynei & Co. and upon that sale we gave receipts to Mr. Seynei.

It was about the Thursday before the insurance sale closed I heard it was going to be shut up. I could see no reason for closing that insurance sale. The sale was running along all right.

The defendant did not employ a bookkeeper or cashier on his sale for these complainants, only his wife and daughter were employed as such. The defendant and his family handled all the cash. I did not see any books being kept of the insurance sale.

I was employed upon the Seynei sale which was continued and sold right along with just about the same marks as the insurance sale. On this Seynei partnership sale none of the Bridge stock sold below the Bridge inventoried cost, except a few leaders for bites. That was all. This Seynei sale was not a fire sale. It was just a clean-up sale.

With reference to the Bridge stock at these two sales the fire sale averaged higher prices than the



(Testimony of John Jeremy.)

Seynei sale. I had charge also of the clothing department at the H. C. Seynei & Co. sale. I should say about fifty suits and about three dozen pants and some raincoats were bought new; about \$1,000 would cover the lot. The Seynei sale was just a clean-up sale, building up new business.

One-quarter of the new stock sold at the Seynei sale and had a profit of  $33\frac{1}{3}\%$ .

I was present when the second inventory was made. It was made on a Sunday right after the first sale, the insurance sale, was closed the day before. The sale in bulk occurred upon the next day, Monday. In the making of this second inventory we made the stock look as cheap as possible for the bidders—the outside bidders; made it look as cheap as we could. This was by the defendant's direction.

Mr. SCHLESSINGER.—I object to that, if your Honor please, on the ground it is not within the issues involved in this controversy. There is no claim here that the company was defrauded by reason of any act [59] on the part of this defendant in the matter suggested by counsel's question.

The COURT.—The objection to any testimony tending to show actual fraud will be sustained.

Mr. OLNEY.—Exception.

Mr. JEREMY.—(Continuing.) Upon the taking of this inventory the merchandise was all stacked up in piles ready for the sale the next day, lumped up; we moved the tables all around to make it look as rough as we could.

I was present when the defendant put up the bal-

(Testimony of John Jeremy.)

ance of the merchandise in bulk for sale. There were present three or four people besides Mr. Isaacs, Mr. Seynei and myself. Some were local merchants from the city. Isaacs came down from the balcony on the right-hand side as you are going in and stood there a little while and pulled out his watch, and says, "Well, boys, the time is up; the stock's sold to Harry Seynei." That was in the forenoon.

Q. Were the bids in his hand?

A. He had a few slips of paper in his hand. I did not see him open any bids.

Cross-examination.

I received \$25.00 a week and commissions. I received no directions from defendant as to how I should fill out those slips.

I saw no bids. I saw no one looking around examining the stock. The total loss was only \$500. Maybe about a dozen pair of trousers were a loss; only the shirts on one counter, about two dozen, were a loss. The fire was all over in twenty minutes. The entire fire was confined to one place about six feet.

Q. How long did it take you to examine that stock for the purpose of estimating the loss at an exact \$500?

A. It did not take me more than 25 minutes or half an hour. I did not see any bids for the tail end of the stock. I did see one or two people there. I saw Mr. Schirmer by the store after the bids were closed. I saw him looking through the stock. The defendant had three or four papers in his hand but I could

(Testimony of John Jeremy.)

not tell the contents of them—whether they were or were not bids. In testifying that goods damaged by fire were sometimes worth more than new goods, I meant a bigger drawing card for the public, and in giving that testimony I was general, not having in mind this particular transaction. [60]

**Testimony of George T. Klink, for Complainants.**

GEORGE T. KLINK, called for the complainants, testified as follows:

My business is that of Public Accountant and I am senior member of the firm of Klink, Bean & Co., with branches in different cities of the coast.

I have prepared a summary of the Seynei books in evidence here, showing the sales, extent of merchandise purchased, and profits on sales. I have examined the books and accounts and this is the result of my examination. Plaintiffs' Exhibit 18 offered and received in evidence.

I made a summary of these two inventories here, Inventory No. 1 and Inventory No. 2, Plaintiffs' Exhibits "C" and 4. That is of the first and second inventories in detail showing the number of articles and cost price of each. This is the summary showing the class and price of goods in which the second inventory exceeds the first.

Plaintiffs' Exhibit 19 offered and received in evidence.

If a sale of this stock had been conducted between the dates of these two inventories, that is if the first inventory had been taken immediately before the sale

(Testimony of George T. Klink.)

and the second inventory immediately after the sale, then the difference between these two inventories gives the correct number of articles sold in these departments and the cost.

I made an examination in detail of the departments comparing the total number of each article at a given price in the first inventory with those of a corresponding character and price in the second inventory; and the result is set forth in these summaries I have presented to the Court. In so doing I find in certain instances there were more articles of a similar kind at a given price in the second inventory than in the first. I find this condition in respect to every kind of article examined; for instance, suits, pants, overcoats, shoes, hats, sweaters. In fact I find these excesses throughout the entire comparison of the [61] two inventories as far as I went.

The inference of course is that there has been some modification and would call for an explanation by some competent person. I have no means of determining whether the prices in the 2d inventory were raised or lowered from the price in the 1st inventory. Possibly if the defendant's sales slips showed the cost prices they might be of assistance; that is if they showed the cost price of each article. Then if they did show the cost prices I would also have to know whether both their cost and selling prices were true and correct. If I had the correct cost price of every article sold on that sale I could account for these excesses.

In the second inventory the excess articles in the



(Testimony of George T. Klink.)

suits over the first, is 155.

The excess of the pants over the first is 300.

The summaries are in evidence.

For instance take the article of Mackinaw coats in the second inventory, Plffs. Ex. 4, with reference as to whether the prices in the second inventory have been raised or lowered from those in the first. The excess of these over the first inventory is 19. The lowest Mackinaw coat price in the first inventory is \$3.25. There were two of these at that price. There were twenty-one at \$3.25 in the second inventory.

Mr. OLNEY.—After a big sale of this Bridge merchandise lasting over weeks, Isaacs had more Mackinaw coats at \$3.25 at the end of the sale than he had at the beginning?

Mr. SCHLESSINGER.—I object to that.

The COURT.—The objection is sustained.

Mr. OLNEY.—Were there any cheaper coats set forth in that first inventory from which he could have made that excess of 19 by raising prices?

Mr. SCHLESSINGER.—I object to that as not being expert testimony.

Mr. OLNEY.—It is expert testimony.

A. There were no cheaper ones.

Q. Then prices on those coats must have been lowered?

Mr. SCHLESSINGER.—I object to that as being argumentative.

The COURT.—The objection is sustained.

Mr. KLINK.—(Continuing.)



(Testimony of George T. Klink.)

At the Seynei sale the total amount of cash sales were \$16,067.94. [62]

The total amount of new merchandise purchased was \$6,263.78.

There was \$24,653.35 amount of Bridge stock at the Seynei sale at inventory prices.

The amount of stock in all is the total of these two or \$30,917.13.

About one-fifth of the entire stock was new.

The total cost of the merchandise sold at the Seynei sale was \$14,283.50.

The gain above the inventory cost was \$1,784.38.

That was a gain of about  $12\frac{1}{2}\%$  or  $13\%$  above cost.

If one-fourth of the new stock sold at a profit of  $33\frac{1}{3}\%$  as has been testified to, the profit on the Bridge stock alone was about  $10\%$ .

In dollars and cents the profit was about \$500 on the new stock, and about \$1,200 on the Bridge stock.

The actual amount of profit on the Bridge stock alone was \$1,262.40 above its inventory cost.

The defendant reported to these complainants that he had on the fire sale sold Bridge stock for \$17,800. If this were sold at a profit of  $20\%$ , as has been testified to, the cost of the goods so sold was \$14,800, and if we deduct this amount sold at cost prices from the first inventory of \$45,974, it gives a balance remaining of \$31,000. That is \$31,000, would be the amount of merchandise on hand after the insurance sale at cost prices.

The second inventory, made by Isaacs the defendant, only shows \$24,600.

(Testimony of George T. Klink.)

The difference between the two is \$6,500.

That is to say Isaacs inventory, the second inventory, is \$6,500, less than what the actual inventory would be if his purported insurance sale returns of \$17,800 were 20% above the original cost prices.

On this basis this second inventory of the defendant shows a depreciation of \$6,500.

If the insurance sale averaged more than 20% above cost, this depreciation would be more. [63]

#### Cross-examination.

Q. Have you examined any books showing sales of 19 days in the store of A. Bridge & Company in making this accounting? A. No.

Q. Have you examined any accounts showing the actual amount of merchandise on hand at the opening of the retail sale and the amount on hand at the close of the retail sale?

A. As represented by the inventories, yes.

Q. Have you examined the slips of daily sales during the 19 days?

The COURT.—He has testified that he examined nothing but the inventories.

Mr. SCHLESSINGER.—Just one question and I am finished: You testified to a profit. Now that profit which you have estimated is based on the cost price of the article and the selling price to the consumer, is it not? A. Yes.

Q. You have not taken into consideration the matter of expense in conducting the sales?

A. In determining the profit, no.

(Testimony of George T. Klink.)

Q. You have not taken into consideration the salaries of employees?

A. As far as my testimony is concerned I did not mention salaries.

Q. Or rents. In other words, your testimony in a word is confined to the difference between the actual cost price of the garment and the selling price to the consumer? A. Yes.

Q. To which you have added freight, or have you added freight?

A. I have presumed that freight is included in the purchase price.

**Testimony of Theo. A. Basher, for Complainants.**

THEO. E. A. BASHER, called for the complainants, testified as follows:

I am a salesman at 103 First Avenue South in the city of Seattle. I was employed as a salesman during the month of September, 1913, during the fire sale conducted by the defendant Isaacs here of the stock of merchandise of A. Bridge for the complainants; that sale being conducted immediately after the fire. I was employed during the whole sale and recollect the *the* Bridge cost mark with which the stock was marked, which was "Buckingham." I assisted in marking the goods, the shoes only, for that insurance sale. On an average the stock marked above the Bridge inventory cost was marked about twenty per cent (20%) above. I do not remember any being marked below; it is so long ago I don't remember.

(Testimony of Theo. E. A. Basher.)

A large per cent were marked above the Bridge cost prices, about half I should say. Everything was reduced from the ordinary price. The goods were all marked down as far as I remember.

Q. Marked down from what?

A. From what is the ordinary price.

Q. Were any marked down from the original cost price?     A. No.

A large part of the stock was sold above the original cost mark. The goods were sold according to the prices put on them. There was no [64] stock sold at wholesale. So far as I know the stock was sold at retail piece by piece over the counter. The insurance sale held up all right throughout the three weeks and in my judgment was a successful sale. I was with Bridge 6 yrs. before the fire. After a clean up sale six months before the fire some new stock came in.

I was employed by H. C. Seynei & Co. during the sale of the balance of this Bridge stock during October and November, 913. That sale occurred immediately after the insurance sale at the same location. The same prices were left on the goods as at the insurance sale; they were not re-marked.

About ninety (90) per cent of the stock was undamaged.

I was paid in cash, \$25 per week, but gave no receipt.

#### Cross-examination.

My special experience has been in the shoe line and I have confined myself entirely to that line. I



(Testimony of Theo. E. A. Basher.)

have no particular knowledge or experience as to the value of other kinds of merchandise. I have no idea as to the amount of cash taken in at the sale or the amount of expense incurred and my idea of the success of the sale is based upon the fact that large crowds of people came in and went out after apparently making purchases. At the insurance sale the best of the shoes went first—the good sizes.

In the whole store about ninety per cent of the stock was in good shape and undamaged by the fire. I mean the whole stock. That is what it averaged. It did not damage more than ten per cent the shoe stock alone.

### **Testimony of J. O. Johnson, for Complainants.**

J. O. JOHNSON, called for the complainants, testified as follows:

I am a salesman at 103 First Avenue, South, in the store of Carl Schirmer in the city of Seattle. I was employed during the fire sale in September, 1913, conducted by Isaacs of the merchandise of A. Bridge for the Insurance Companies immediately after the Bridge fire, [65] I came in the day before the sale started; it was on Friday and the sale started on Saturday; and I remained with him until the end of the sale. I recollect the Bridge cost mark with which the stock was marked. It was "Buckingham." The clothing stock was all then marked. I did not assist in the making and so far as I know a man named Jeremy marked it.

Of the merchandise marked above I should say it



(Testimony of J. O. Johnson.)

was marked 10% to 15% above the Bridge cost price on the tags. I occasionally sold in other departments than the clothing department when busy to help out. To the best of my knowledge the goods were sold according to the sale prices on them for the fire sale. There was no stock sold at wholesale that I know of. To the best of my knowledge it was all sold piece by piece over the counter at retail. The insurance sale apparently held up well during the three weeks and in my opinion was a successful sale.

I was employed by H. C. Seynei & Co. during the sale of the balance of the Bridge stock. As I remember the same prices were left on the goods. I was paid in cash, eighteen dollars a week.

#### Cross-examination.

In a sale like the insurance sale naturally the best stock will go first. After the sale had stopped the sizes were pretty well broken, all sold down. All the clothing was exposed to sale. Everything was offered indiscriminately in the store. In a fire like that which took place in the Bridge store the clothing is more susceptible to damage by smoke or water or fire than any other merchandise. The odor and smoke will stay with the clothing. In one way or another I should say the per cent of damage to the Bridge clothing was about ten (10) per cent.

**Testimony of William J. Meyer, for Complainants.**

WILLIAM J. MEYER, called for the complainants, testified as follows:

I am employed by the United States Rubber Company at 216 Jackson Street in the city of Seattle. I was employed during the fire [66] sale in September, 1913, conducted by this defendant of the stock of merchandise of A. Bridge for the Insurance Companies immediately after the Bridge fire. I was employed from the start of the sale until the end, the wind up; during the entire period of the sale. I recollect the Bridge cost mark; it was Buckingham.

I assisted in marking the goods for this sale. I marked the furnishings and hats. I had been with Bridge about six months before the fire. I also helped mark some of the pants.

Q. How was the merchandise to which you refer marked with reference to the Bridge cost price, above or below?     A. Above cost.

Q. What per cent above cost?

A. Well, to my recollection now, I would imagine about 15 per cent, probably a little better.

None in my department was marked as high as 25% to 30%. All that I know of that stock of merchandise sold above cost price. During that sale I sold all over the house, in other departments than my own. The sales in those departments in regard to the cost mark on the Bridge cost prices kept approximately the same as the furnishings; that is all above cost.

I was paid in cash out of the drawer but signed

(Testimony of William J. Meyer.)

no receipt. To my knowledge there were no goods sold at wholesale but the stock of merchandise was sold piece by piece over the counter at retail. The last week it fell off considerably. I should say on the whole it was a successful sale.

I was employed by the Seynei Company during the sale of the stock immediately after the Bridge sale. On that sale the same prices were left on the merchandise as on the insurance sale. The prices on the Seynei sale were about the same as on the insurance sale.

I was with Bridge during his sale some months before the fire. It was a clearance sale and the odds and ends and remnants of the stock were sold off at that sale some months before the fire occurred. I don't remember the prices on that sale. That clearance sale was a successful [67] sale and after that sale new stock came into the store.

#### Cross-examination.

I am absolutely sure that every item that goes under the heading of furnishings, hats, pants and underwear, was marked above the Bridge cost. The stuff that was burned and water-soaked was marked below, but the stuff that smelled badly and was smoked was not cut down below cost. Fifty cent garments at retail prices sold for I think 33 cts. No underwear was sold for less than 33cts, a garment. The damaged—burned and water-soaked shirts and collars were sold as low as 15 cts. At the beginning of the sale the collars sold four for a quarter; it seems to me they were afterwards re-

(Testimony of William J. Meyer.)

duced to six for a quarter. Collars are \$1.20 a dozen. now. About five per cent of the hats were reduced. There were not enough caps in the stock to bother with, we sold out two or three dozen caps. In all sales there is a great demand for handkerchiefs; the cheaper ones were marked below cost as leaders. Socks were not sold below cost. Towards the end of the sale there was a cut in just a few odds and ends in my department. Overalls sold at a considerable cut; they were sold at 59 cts. a pair at first and then they were raised, I think the second week. Thus there was a readjustment in the marking of the overalls. I said it was a successful sale because lots of people came in and went out having made purchases. I have known of sales where great crowds of people have come to purchase and yet it was perhaps a loss in the end. Not having the figures I cannot state whether or not the sale was a success. After the fire sale had stopped, and before the place was opened up under the name of Seynei, new goods came into the store and improved the stock.

#### Redirect.

As a rule the merchandise that I have spoken of as having been sold at a reduction was either damaged stock or stock sold as a leader. [68]

#### Testimony of J. Lester Esch, for Complainants.

J. LESTER ESCH, called for the complainants, testified as follows:

I am manager of the safe deposit vaults of Wm.



(Testimony of J. Lester Esch.)

D. Perkins & Co., private bankers in the city of Seattle, at 211 Cherry Street. As such I have possession and charge of the records of such safe deposit boxes, the names of the owners and the visits made by the owners to their boxes.

On the 6th of September, 1913, D. Isaacs rented a box of us. I have the records showing the times and dates he visited the safe deposit box during the month of September, 1913. The times and dates of his visits to that box during the month of September, 1913, were as follows:

September 6th, he entered the box twice, 9:30 A. M. and 5:02 P. M.

September, 9th, 3:28 P. M.

September 13th, 6:55 P. M.

September 15th, 10:02 A. M.

September 20th, 7:38 P. M.

September 22d, 10:12 A. M.

September 27th, 7:38 P. M.

September 29th, 12:14 P. M.

### **Testimony of Alexander Bridge, for Complainants.**

ALEXANDER BRIDGE, called for the complainants, testified as follows:

I reside in the city of Seattle and was the owner of the stock of merchandise there which is referred to in this cause, at 103 First Avenue, in 1913.

Immediately after the fire that stock consisted of clothing, furnishings, hats, shoes, blankets, and all that stuff. It was mostly a staple stock. For instance the hats would be mostly Stetson hats. Be-



(Testimony of Alexander Bridge.)

ing down below, I am speaking of the store where the fire occurred, [69] we did not carry anything but regular stock. The shoes were Douglas shoes and we carried a line from Smith in Chicago; Chip-pewa shoes and Birch shoes, and all such stock; and also rubber goods. The rubber goods were also staple stuff and we filled in as we went along. We never had much odds and ends. We never looked for any jobbing of any kind. I have been in business since 1892 or 1893.

In the taking of the inventory after the fire we did not add the freight. That should be added to the cost price in the inventory. That inventory also does not take account of and show the discounts. The total value of my stock after the fire was over fifty thousand dollars.

After the fire I assigned my stock of merchandise to Mr. Truax as the representative of the bank for the benefit of my creditors. He disposed of my stock of goods for \$34,000 to the complainants without my consent. As an individual I would never have sold that stock at that time for that amount. I now have a suit pending against Truax for so sacrificing my stock; this same stock of merchandise. That suit is now pending for \$75,000 for sacrificing this same stock of goods in selling to these companies for \$34,300.

I could have sold this stock myself after the fire at a retail fire sale on the same premises, where I had been known for years to the public, at a profit above the inventory cost price; I figured I could

(Testimony of Alexander Bridge.)

sell it at 15% to 20% above the price named in this inventory, Plffs. Ex. "C." That stock was in fairly good condition and there was some new goods amongst it. I had just a few months previously got through with a big sale and cleaned up and replenished the stock with new merchandise in the neighborhood of \$20,000, filled in.

It was my custom to pay cash and discount my bills and so reduce the cost of my merchandise; so the prices in this inventory, Plaintiffs' Exhibit "C," do not include the discounts.

I have knowledge of the sale by Isaacs as trustee for these companies. I had my office during it upstairs in the store and I came [70] in every day during the course of that sale for my mail. I have knowledge of how the goods of that stock were marked and sold on that sale. Nothing was sold below the cost mark in this inventory. There was some stock sold at a fairly good profit; some \$7 and \$8 suits marked at \$12.33, \$14.75, and as high as \$17.88; \$10 and \$11 suits for \$17.85. There was four or five hundred suits that I bought one time for \$2 or \$2.50, and these suits were sold cheap—at \$3 or \$4. They were boys suits. They didn't make much profit on them.

During the sale there was a big force of salesmen. It was a terrible sale; the biggest business that was ever known in Seattle. I personally saw the tags. My original tags and cost prices were left on the stock during the defendant's sale for these insurance companies. It looked like a highly successful

(Testimony of Alexander Bridge.)

sale to me. Before the close of the sale and the sale of the balance of the stock by Isaacs to himself he stated to me and to everybody that he had then taken in his guarantee and expenses. I heard him say so several times in that store on several different occasions during that sale.

On my clearance sale prior to the fire to which I have referred I realized 20% to 25% profit above cost. At that sale I sold off the odds and ends and cleaned up my stock principally.

As a business man of long experience I would say that one day's notice of sale of a large stock of merchandise in bulk, such as my stock, was not sufficient and conducive to obtaining the best price for the seller. I had people myself who wanted to bid on that stock. When we came in, that was in the morning, the thing was all over; it was all over before noon. I came in with friends of mine who figured to put me in business. I had no chance at all.

In order to save a few hundred dollars of running expenses I would not have sacrificed several thousand by selling this stock in bulk in haste with only one day's notice to the public. The defendant could have advertised this sale in bulk in the papers while the retail [71] sale was going on. The whole thing looked to me like a frame-up because I was concerned in that stock as much as anybody and I absolutely had no chance; it looked to me like a frame-up proposition. My reason was I had the fixtures there, worth about \$5,000, and I thought I had a chance to get back into business for which there

(Testimony of Alexander Bridge.)

were people who wanted to stake me.

Cross-examination.

I made the assignment to Mr. Truax, the credit man of the Seattle National Bank for the benefit of my creditors. At that time I owed in all \$44,000, but not that much for merchandise, of which amount \$15,000, I owed the bank. The sale that I had before the fire was in February; I was trying to raise money from that sale in order to pay off the bank. The store was closed after the fire when the assignment was made. Truax never ran the business at retail. Mr. Mason was never selected by me to adjust the loss. He was chosen by Mr. Truax, the bank's credit man. I don't know regarding either the honesty or competency of Mr. Mason. The inventory that was taken is correct so far as it gives the original cost of all the goods that were in the store, less the freight and discount.

**Testimony of George H. Bailey, for Complainants.**

GEORGE H. BAILEY, called for the complainants, testified as follows:

I am an attorney at law and have been practicing as such for the past twenty-two years and was so practicing my profession in the State of Washington in Seattle during the months of September, October and November, 1913. I know the defendant, D. Isaacs. I first met him in the store of A. Bridge & Co., on First Avenue in Seattle, I think about the ninth day of September, 1913. He was in charge of the sale for the complainants of the stock of A.



(Testimony of George H. Bailey.)

Bridge & Co., at that time. In Seattle during that month of September, 1913, I had conversations [72] with the defendant relative to how the sale was going. I was in the store frequently during the period of the sale and had conversations with Mr. Isaacs as well as Mr. Seynei, who was in charge of the sale under Mr. Isaacs. He was really in charge of the help.

As near as I can recollect the substance of these conversations with the defendant relative to how the sale was going, were about as follows: Mr. Isaacs said on different occasions that the sale was going very successfully, that it was going beyond his expectations both in volume of goods sold and in the prices received. Conversations to this effect were frequently held every day or two during the period of this sale. What I have just said covers only the period of this sale in September, 1913, and prior to September 27th, the date on which, as I remember, the sale closed. I had two conversations with Mr. Isaacs during the last week of the sale in which he stated, first, during the forepart of the week, that the sale had gone very favorably; that he was going to get out of it, probably that week, his guarantee, expenses and commissions. Later, on Saturday, about the middle of the afternoon, on the 27th of September, I was in the store and I asked him if the sale had reached the point that he had prophesied earlier in the week, and he stated emphatically that it had; that it had paid all his guarantee, expenses and commission, which was very



(Testimony of George H. Bailey.)

remarkable. He further stated that the best part of it was that they had gotten unusually good prices; that they had gotten above—in fact in other conversations during the month, he had stated that he had been getting above original cost prices for the goods. But, as stated, on that afternoon, the 27th, the sale was a complete success and he was beaming with satisfaction over the results. He was elated over the result of the sale and went on to speak of his ability in handling these things, that he could get more out of them, as was shown in this particular case, than others usually could, and he was really lauding his own ability to me to some extent as well as the success of this [73] particular sale. He said that they had received nearly or about 20% above cost; what he meant was the cost to Bridge, that was the cost he was speaking about, not the cost to him; he was speaking about the cost price, the original cost. The statement was clear and emphatic that he had made good his guarantee and expenses of that sale before the close of the retail sale on that day.

This insurance sale was conducted within three blocks of my office in Seattle. The number of people was always great in the store. They had to have police help to handle them, and the storeroom was full of the public examining or purchasing, or both, as is always during all of these sales, except, perhaps at some special hours of the day. It was my habit to go down in the morning, as a rule, and see how things were coming along. I am not a merchant

(Testimony of George H. Bailey.)

and my opinion or knowledge of the sale was obtained from observation of the crowds, the amount of goods going out and the statements of Mr. Isaacs and also Mr. Seynei in regard to it. Based upon that I think it was an exceptionally successful sale. These statements of Mr. Seynei were usually made when he and Mr. Isaacs were together. There were several times when statements to the effect that the sale was successful and they were getting a good price for the goods were made by Mr. Seynei in the presence of Mr. Isaacs, in which Mr. Seynei turned to Mr. Isaacs to O. K. the statements to me, which he did.

I had other knowledge than the statements of the defendant and Mr. Seynei as to the prices they were receiving for the goods. I was there when Mr. Basher was complaining in regard to not being allowed to get as much as he thought he was entitled to for some shoes. He stated that that particular shoe, or brand of shoes, could be sold at a better price and he took it up with Mr. Isaacs, saying that the shoes would all be gone and when they could be getting more money out of them. I do not know the result of their conversation; that was the only statement I remember as to any particular person remarking about the sale. But he remarked that at the prices they were getting they were going to sell out the shoes and that they had better raise the prices. Basher was the clerk in [74] charge at that particular time of the shoes. These statements were all made to Mr. Isaacs.

(Testimony of George H. Bailey.)

I do not know the number of salesmen employed at the retail sale. I would say from two dozen to forty some, both men and women. They varied to some extent. There were other salesmen, in the clothing department, that I knew, that stated to me that the sale was going well and successfully. If I remember rightly one of their names was Meyer, and I do not think I remember the others. The remark was made to me by at least three of the salesmen in the clothing department, they were even selling at above cost while advertising below the Bridge inventory cost prices—that they were advertising to sell below cost and were actually selling above cost. That statement was made by Meyer and at least two others.

I had knowledge and observed another sale of the balance of that same Bridge stock of merchandise after the close of that first retail sale. I had the same knowledge obtained the same way of the two sales. The subsequent sale was made and conducted by Mr. Seynei or really Seynei & Co., which comprised Seynei and Isaacs. This subsequent sale was conducted in the same building without moving the goods. From my personal observation and knowledge the insurance retail sale by the defendant for the complainants was successful as the subsequent sale by Seynei & Co. My memory is that the insurance company sale was at a little higher prices during that period.

The balance of that stock was not all sold in that subsequent Seynei & Co. sale. The stock was sold



(Testimony of George H. Bailey.)

in bulk on September 29th, by Isaacs to himself, or rather Seynei & Isaacs. Isaacs prepared the bid and Seynei presented it to Isaacs for the goods which were then turned in to Seynei & Co., and the subsequent sale conducted by Seynei & Co. was continued through October and, as I remember it, up until about the 20th or 22d of November. I may be a little mistaken as to the date when they closed, but they were not allowed to hold the room any longer [75] and boxed up the stock—moved it out.

The defendant and Mr. Seynei had made their agreement to enter into partnership during the period of the insurance sale, had then agreed to purchase this stock and go into business as Seynei & Co., in which no one would be interested but the defendant Isaacs and H. C. Seynei. That partnership was continued during the later sales and disposition of the goods. A written partnership agreement was prepared but never signed by the parties.

Regarding the sale by the defendant of the balance of the Bridge merchandise in bulk to Seynei and himself as partners; Isaacs advertised on Sunday that the sale would take place Monday of the goods in bulk, as I remember, about eleven o'clock, the business would be open. This was the Sunday and Monday following September 27th, 1913. I did not know at the time but afterwards found that the advertisement was inserted in the *Seattle Times*. The defendant did not appear publicly as a bidder in his own behalf. The bid was made in the name of H. C. Seynei; and on the following Monday the sale

(Testimony of George H. Bailey.)

was made in the name of H. C. Seynei as purchaser, as I have stated.

In my opinion as an attorney of considerable experience with regard to one day being sufficient notice for such a sale in order to give all the bidders a chance in justice to the owner of the merchandise, I would say: The nature of the goods was such and the conditions pertaining to the handling of the goods, that they had been retailing from the stacks, boxes and counters of these goods right up to Saturday night and made it impossible for any prospective bidders to know anything about either the quantity or the value of the goods in the store Monday morning by eleven o'clock in sufficient detail to make an intelligent or safe bid.

As I had been told this sale in bulk was coming off Monday morning, by Mr. Isaacs, I went down at that hour and was there when the bids were opened. Two men whom I did not know were complaining to Mr. Seynei that they would like to have bid had they time to examine the [76] goods before the bids were opened, but could not do it. I do not know how many bids were in, nor what any of them called for, but a few minutes afterwards Mr. Seynei came back and told me he had got the goods but that he knew he would all the time.

Before I left the store at this time Mr. Isaacs told me that "We have got the goods and they are all in perfect shape. Now we will put on a sale and make plenty of money."

From my experience as an attorney my knowledge



(Testimony of George H. Bailey.)

as to the customary time for advertising such a sale in bulk is from three to fifteen days.

Cross-examination.

I never had, nor have now, nor at any time, any interest in this action at all. Never heard of it until recently. I have never or at any time or now represented any of the complainants. I know Mr. Jesse Olney. I have had nothing lately in which he was interested, except the case of H. C. Seynei versus the defendant in this case, that I know of. That action was prosecuted by me against the defendant on behalf of Mr. Seynei and related to the same subject matter involved in this action. For two or three years prior to the incidents related to in this matter, I was Mr. Bridge's attorney and acted as such up to the time he made the assignment to the Seattle National Bank. I think that assignment was after the fire. I then represented Mr. Bridge in the preparation, I think, of the notices and served them on the agents or adjusters of the complainants and, if I remember rightly, that was the last thing that I ever did as attorney for Mr. Bridge. I afterwards represented Mr. Isaacs in a case in relation to the lease of the building in which these goods were sold during the sales mentioned. I became the attorney for Mr. Isaacs and Mr. Seynei, or Seynei & Co. later.

As I have said I have at different times represented Mr. Bridge, Mr. Seynei and Mr. Isaacs. I never represented the assignee of Mr. Bridge; I had no connection with the sale in bulk in any way; my only connection with Isaacs having been in the case

(Testimony of George H. Bailey.)

of the Gatzwett Schwabacher Land [77] Co., in which suit was brought as I have said. That was for Mr. Isaacs and Mr. Seynei. I do not think I had anything to do for them until early in December. As I have said I have had nothing lately in which Mr. Seynei was interested except the case of H. C. Seynei against the defendant in this action. In that action we were pursuing the partnership property of Mr. Seynei in this same property which Mr. Isaacs the defendant in this case later denied and which we substantiated in this same court in San Francisco. The judicial determination of that case was in favor of Mr. Seynei and settled by the defendant in this action.

I do not remember even of having been asked a question by Mr. Isaacs in regard to these companies, nor anything pertaining to the insurance business when he was there. When he first came he indicated to me that he was such a high up representative of these complainants that he dealt only with the heads of these companies and the head representative at San Francisco; that he was above all the other adjusters and had nothing to do with them.

During the insurance sale, Mr. Seynei talked with me relative to whether he should go into partnership with the defendant and advised with me regarding it. I represented no one as attorney until as I have stated. The partnership between Mr. Isaacs and Mr. Seynei came into being during the insurance sale, or they made their agreements—and they further in my presence, discussed or stated that they thought

(Testimony of George H. Bailey.)

they were going to go into business as Seynei & Co. Mr. Isaacs stated that he was satisfied, from what he had seen of Mr. Seynei, that the latter had ability to handle his business; that he wanted to establish his business there, and that they were going to commence it on this stock. That conversation took place during the latter part of the insurance sale, probably the last week. They did not confer with me in regard to anything. I was down there looking around, watching how the business was going and they stated—never advised with me in any way, either as their agent or attorney—but, as stated, the conversation that I have given you, Mr. Isaacs had the floor, as he usually [78] did when they were together,—he was going to establish this business and take Seynei in as a partner. There was no conference. It was Mr. Seynei who introduced me as a friend and he was speaking to a friend, telling him the matter of their mutual interest at that time. I had not been paid for my services to A. Bridge & Co., and I was interested in knowing how soon money would be paid and settled and was a little watchful on my own account. I was not there on any other purpose and simply on a friendly interest in it on account of Mr. Seynei. The fees that were due me were not particularly to be paid out of the insurance money; the insurance money was pretty well taken care of at that time by claims of creditors who were pushing the estate harder than I was willing to push it.

The Bridge estate, as represented in the assign-

(Testimony of George H. Bailey.)

ment, consisted of some 1,900 acres of land in different tracts in the State, two or more apartment houses and some residences in the City of Seattle, all of supposed value, at that time, from \$100,000 to \$200,000. The insurance money was not even the largest part of the estate, but it was the ready cash paid at that time. The whole conduct of the whole estate has been a matter of interest. There never has been a time when that interest has been ended, I am very sorry to say, and the interest was connected only with my interest therein, and the changes that were taking place.

I do not know whether the insurance companies had made settlement with the assignee before the sale commenced. There was a dispute over the lease. The last statement of Mr. Bridge considered the lease as a liability instead of an asset.

On Saturday, September 27th, Mr. Isaacs informed me he was going to sell the stock in bulk, and I asked him why. That was the first intimation I had as to the capacity in which he had been working. I went to the store probably three or four times a week during the sale; that was purely out of my friendship for Mr. Seynei, who, at the time, I did not represent; and seeing how things were going, and making trifling purchases [79] now and then. My interest in seeing how the sale was going was nothing more than that beyond my interest in it through Mr. Seynei.

Q. That small interest took you to the store at least three times a week and caused you to make



(Testimony of George H. Bailey.)

these observations and careful inspection?

A. That is true. At that time Mr. Seynei and I were very close friends, and I was very much interested in helping him and was looking after the lease for him, trying my best to obtain it from the owners. I was not particularly interested in securing my fees from the sale only as to the speed with which I might get my money. I never doubted but that I might sometime get it. I have not got it all yet, neither has the estate been wound up. I had advised the assignment to the bank in the first instance.

I usually went down in the morning. Mr. Isaacs was usually there and I would have a talk usually of from one to several minutes, usually just a few minutes, in regard to things, and before going round to the office, and at that time neither Mr. Isaacs nor Mr. Seynei were busy. Then at other times I would perhaps come in with a friend, or someone like that. At that time this was the largest sale in that part of the State and it was things that men were all interested in. I have not that same friendly feeling toward Mr. Isaacs at this time; not since he tried to rob Mr. Seynei of his interest in the goods, which was established in this court. Mr. Isaacs never had possession of the building. I would not be able to state definitely at this time as to so many words that Mr. Seynei heard in our conversations, and how many words he did not hear, but when all three were present it was usually Mr. Isaacs who was doing the talking. If you knew Mr. Isaacs, you would appreciate that fact. I know that when they opened the



(Testimony of George H. Bailey.)

sale and for some time thereafter they had to have a doorkeeper to close the door to prevent the building from becoming overcrowded.

It was on Saturday that the defendant told me he was going to sell the stock in bulk. I knew the goods for sale on Monday were the goods handled by Mr. Isaacs during the insurance sale [80] from the reason there were no other goods. On Monday he sold the goods in the store and that was what was advertised on Sunday. I knew Mr. Seynei expected to get the goods but I did not know how they were going to do it. He had before that time told me what Isaacs had offered him. On Monday, the day of the sale in bulk, when Mr. Seynei told me that he had the goods and would make plenty of money, Mr. Isaacs was present. Mr. Seynei was there and I remarked that it would be a pretty good joke if someone else had come in at that point when they had agreed on their partnership, and bid in the goods, that is, put in a bid over Seynei; and Mr. Seynei laughed and said that could not very well happen, Mr. Isaacs knew what to bid and gave it to him to put in. That was in Mr. Isaac's presence. I do not know whether there were other bids submitted for the goods. I think there was one or two others. I don't know that there was any competitive bidding but I think so.

In detail I am unfamiliar with the amounts realized upon the sale of the merchandise in question and the account or accounts of Mr. Isaacs and the complainants in this case. I know that he sold the

(Testimony of George H. Bailey.)

goods for a great deal more than he guaranteed the insurance companies. That is admitted by Isaacs and Seynei both in the Seynei case in their testimony. They made such admissions to me and to this Court. I am not speaking about the insurance sale being twice as much or more, but that they sold the goods for very much more. My memory is that at the insurance sale Mr. Isaacs' statement was that he had sold his guarantee, expenses and commissions, that he covered all of that, and sold some \$16,000 worth of the goods by Seynei & Co. I say \$16,000, possibly it was \$15,000 that they boxed up; and it was a greater sum, some \$23,000, that they sold, a very great deal more at these various sales over and above expenses than was paid to the insurance companies. [81]

**Testimony of E. K. Reiley, for Complainants.**

E. K. REILEY, called for the complainants, testified as follows:

I reside in Seattle and am the Auditor of the Seattle National Bank. I have charge of the books of the bank containing the accounts of the various depositors. These books contain the amount of the defendant in this case. The account was opened September 5th, 1913. I have prepared from the books of the bank a statement of account of the defendant showing the deposits and withdrawals of that account, Plaintiffs' Exhibit "D."

There is only one instance that I can locate from our books where the defendant purchased a draft

(Testimony of E. K. Reiley.)

on San Francisco. That was on November 15th, 1913. On that date he purchased a draft for \$7,350 on the Crocker National Bank of San Francisco, payable to D. Isaacs. I have it here. It bears the endorsement of D. Isaacs and Naomi Isaacs. Also bears the endorsement of the German Savings & Loan Society, A. H. R. Schmidt, Cashier, in which they endorsed it over to the Crocker National Bank and was charged to the account of the Seattle National Bank. I should say this draft was deposited in the German Savings & Loan Society by Naomi Isaacs. [82]

**Testimony of J. R. Mason, for Complainants.**

J. R. MASON, called on behalf of the complainants, testified as follows:

I am an adjuster of fire losses, residing and having my office in the city of Seattle, State of Washington. I make business examinations of stocks of merchandise and place values on them and am an expert in estimating the value of merchandise losses by fire, having been in the business about six years. I was employed as such by Bridge's assignee to adjust the loss of A. Bridge in his store in Seattle after the fire there, August 11th, 1913. I caused an inventory to be taken of the stock at that time. Everything in the store was put in that inventory. This is the inventory, Plaintiffs' Exhibit "C."

Q. Have you the inventory, Mr. Mason?

A. I have the original here, yes.

Mr. OLNEY.—Witness produces inventory taken

(Testimony of J. R. Mason.)

after the fire on August 11th, 1913, at the Bridge cost price; and we offer it in evidence.

Mr. STERN (Defendant's Attorney).—No objection.

This so-called recapitulation (Defendant's Exhibit 1) is not a part of the original inventory of the goods. It was made following the conclusion of the inventory and was a recapitulation in quadruplicate copies. My recollection is that the inventory amounted to about \$46,000. I examined the stock of goods after the fire and the claim I originally made up was approximately \$18,000. My final claim was \$16,200.

Q. Did the insurance companies, these complainants, refuse to pay \$16,200 for the damage to the stock?

A. They disagreed with me as to the amount.

Q. Did they refuse to pay it?

A. They refused to pay it; refused to accept it.

The insurance companies proposed to agree with me on a sound value and take the entire stock. I made a counter offer to the insurance companies of \$36,000, at which price I was willing to sell them the stock. I made no offer of \$38,675. That amount was the estimated sound value of the stock shown in my statement of loss and I consider that a fair price, and it was based upon an estimate made by two capable merchandise men in the city. It was not intended as a price at which I would submit the stock for sale; it was for the purpose of adjustment, to ascertain the amount of the losses. The first step



(Testimony of J. R. Mason.)

being to find out the sound value of the goods. [83]

Q. Did you finally compromise on a cash sale price to these insurance companies, these complainants?

A. Yes.

Q. What was that cash sale price?

A. My recollection is it was \$34,300.

In taking into consideration the acceptance of that amount as a compromise, the fact of another month's rental being imminent, some \$920, and the saving of that rental, entered in. That rental was due in a few days. There was also the condition existing that the creditors of Bridge were asking for their money. I also took very largely into consideration the fact of Bridge's inexperience with fire sales. At that time I was acting for the assignee of Bridge's creditors and I was very largely satisfied that Bridge, on account of his inexperience, would not be able to obtain as good results from handling the stock. Some time ago I heard from Mr. Truax that Mr. Bridge was threatening to bring suit, claiming the stock was sacrificed at that figure (\$34,300).

If I had been free to use my own judgment entirely I do not think I would ever have accepted \$34,300 for that stock; but I was acting under instructions on the closing of that sale. The least I would have accepted would have been \$36,000.

It was a staple stock. I consider a stock in competent hands handled as a fire salvage stock would yield anywhere from 25%, 30%, 40%, or possibly 50% above its actual value. The first day of the retail sale the defendant told me the proceeds were



(Testimony of J. R. Mason.)

something like \$4,000. He spoke very optimistically of it.

Q. Mr. Mason, from your knowledge of this stock after the fire and at the time of the Isaacs' sale for the complainants of that stock in your city, and taking into consideration Isaacs' expert handling of fire sales, is it your judgment that the stock should have sold at retail at the inventory prices, which were the cost prices?

A. It should, in my judgment, be sold at retail at prices approximately inventory value; of course, less damaged goods. The best should have sold way above inventory; naturally the best sells first.

An estimated loss does not necessarily mean a complete loss. A clever salvage man such as the defendant can take a damaged stock and recondition it and reduce the estimated loss. I would not say he could reduce it 50%, [84] I would expect him to minimize the loss materially.

As an experienced adjuster and one acquainted with sales of this character, I would say one day's notice of sale of such a large stock of merchandise in bulk was not sufficient nor conducive to obtaining the best price possible for the owner. Such short notice would prevent any large number of competitive bids. I do not consider the defendant's notice of the sale in bulk sufficient time to allow outside bidders a chance to examine the stock. I do not consider such notice conducive to obtaining the best price possible for it. A notice of a week or ten days would have been better and more customary, assuming that there

(Testimony of J. R. Mason.)

were other available buyers than those who were already informed of the sale; I do not consider that such short notice of sale was fair to these complainants.

Taking into consideration the fact that the defendant as the complainants' broker was contemplating the purchase and buying in of the stock for himself, and did buy it in for himself, I do not consider such short notice fair to these complainants in obtaining the best possible price for their merchandise. If it appears that the broker in such manner buys in the stock of merchandise inventoried at some \$24,000 cost price in bulk for himself at \$9,000, I would not consider that his employers, the owners of the stock, had been fairly treated or received a square deal.

I presume in so buying the stock the broker would certainly expect to resell it at a profit. In such case where a broker purchases stock in bulk for himself and sells it at a profit for himself, the conditions being equal, he should have continued the sale at retail for the owners of the stock, and they should have had the profit.

#### Cross-examination.

That inventory of \$46,000 did not fairly represent the true, sound value of the stock at the time it was taken. My judgment of the sound value after making proper allowances for depreciation was \$36,000. The adjuster for the insurance companies placed it at \$33,000. By negotiations we finally compromised on \$34,300. I was acting under [85] instructions on the closing of that sale to the companies. I did not

(Testimony of J. R. Mason.)

get within \$1,000 or \$1,500, of what I would have insisted upon or gone into an appraisement in settling the amount of the loss. I would not have disposed of it for less than what I thought the stock was worth if I had not been forced to do so. I thought on the whole I was doing pretty well for my client. I did better than my instructions. Naturally the best class of merchandise of the entire stock sells first, unless you take it out of sight where the customers cannot see it; and a time comes when the sale must be suspended and the balance sold in bulk. One method is to sell at public auction. If the representative of the insurance companies had been advised of the sale before hand at sealed bids, and that the salvage man himself put in a sealed bid, to protect the stock from being sacrificed, I think that would protect them. I still think it unfair if a broker sells to himself \$24,000 worth of merchandise for \$9,000, unless he can show he has given notice to the owner and has the owners' consent. A broker has no right to bid without the authority of his principal. I consider 45% a reasonable price for the remnants of that sale, if they were the average remnants such as would follow a retail sale, all broken lines or badly damaged goods, such as would naturally be left by buyers. There were lots of buyers in town here at the time this sale was going on ready to bid on short notice and who kept in close touch with a stock of goods and were in a position to make a quick bid. The question of character and length of notice to be given buyers is influenced by various condi-

(Testimony of J. R. Mason.)

tions. Where a sale breaks down to a point where the cost is 50% to do business, it would be advisable to hurry a sale in bulk through as quickly as possible. Any notice that would be sufficient to assemble a requisite number of responsible buyers and competitive bidders would be fair, and I would say that such sale was conducted under such circumstances as made it probable that as much had been realized as might have been if there had been a more extended advertisement in the newspapers.

#### Redirect Examination.

If a party who conducts a sale is thinking of buying in half of the [86] stock himself after selling first half, the temptation would be present very strongly to sell off the poorest first. An advertisement run once would not attract many buyers. Knowing Mr. Isaacs as an expert in fire sales I consider that if he bought this stock at \$11,000, he would expect to make a profit; and to that profit you would have to add expenses to arrive at the actual value of that stock. If a similar sale was conducted at a profit by Isaacs immediately after the first sale, I would not say all things being equal that sales could be dropped to such an extent as counsel says. If the balance of the stock sold in bulk was more than half the stock, it could not all be remnants; of course, the lines are broken. I consider \$11,000 a fair valuation of a stock, the other half of which sold at retail for \$17,800. That is just about the usual per centage of profit at a retail sale—not a fire sale. I never saw the stock later than a day or two after the insurance



(Testimony of J. R. Mason.)

sale opened. If the same stock sold at the same place at large profits, I would consider it to be a pretty well-preserved stock if it had not been filled up. If the best of the stock was sold at the insurance retail sale, it should have brought very good prices, away above the inventory cost; and if the defendant's statement shows that that brought 25% below I would be disappointed in the returns. I would consider the sale very disappointing.

#### Recross-examination.

My judgment of the best method of attracting bidders is to communicate direct with the buyers. When I seek a buyer I telegraph to Portland and San Francisco. An advertisement in the newspaper does not reach the Portland and San Francisco buyers; local buyers know all about it anyway. Where a stock is turned over to a salvage man for sale either under a guarantee or commission my experience is that the expectations of the insurance company are very disappointing. I knew this stock well at the time it was turned over to the insurance companies. It was a staple stock. I consider this stock should have brought approximately the inventory value. I should say that if \$18,000 worth of merchandise sold at retail the remaining stock under ordinary conditions would be the most damaged part [87] and the less salable. There was a small portion of it not identifiable; it might be anywhere from three to seven hundred dollars. The reason it could not be identified is that it was burned and obliterated. I think it was all on one or two tables and was inventoried from



(Testimony of J. R. Mason.)

memory by a clerk. He put it in the inventory, but it was of no value. I never heard that there were any goods there that were not inventoried. I inventoried everything that was in the store, that is, all that I knew about. [88]

**Testimony of George C. Main, for Complainants.**

GEORGE C. MAIN, called for the complainants, testified as follows:

I am a fire insurance adjuster, residing in the city of Seattle, in the State of Washington, my office being located in that city. I was employed to adjust for the complainants the Bridge loss in Settle, Wash., after the fire there August 11th, 1913. I examined the damaged stock of goods after the fire. Very little was actually damaged by fire. Practically all of it was damaged more or less. The maximum that I was willing to allow the assured on account of damage was between \$13,000 and \$14,000. Bridge, the assured, claimed something over \$18,000 as his loss. The final claim was \$16,200. I could not agree with the assured as to the loss so I worked down the valuation of the stock as low as possible for the complainants to take over the stock in bulk, at as low a valuation as possible as a speculation, expecting them to realize a substantial gain on it at retail over and above the amount we could have adjusted the loss with the assured at; otherwise there would have been no object in taking it over. Bridge's adjuster placed a value of some \$38,000 on the stock. Finally by way of compromise only, I succeeded in getting the price

(Testimony of George C. Main.)

down to \$34,300, and the complainants purchased the stock for that amount from Bridge's assignee. I refused to pay \$16,200 claimed as loss by the assured because I thought by buying the stock for cash in bulk wholesale the loss could largely be reduced by sales at retail. I had a guarantee of \$18,100 above expenses from this defendant if the complainants took over the Bridge stock for \$34,300, and upon that guarantee I settled with the assured, paying the \$34,300 cash, and taking the stock. I did not consider there was an opportunity to obtain more than defendant's guarantee and expenses. I was free to drive a better bargain, if I thought I could make one. In my opinion it was a fair proposition. I never put it up to anybody else. There were no other quarters bidding, no one else entered in the transaction. I hoped, however, there might be a substantial sum beyond Isaacs' guarantee and expenses and so advised the complainants. The allowance of \$16,200 as damage was in compromise only on the condition that the value should be reduced to \$34,300, as I did not admit at any time the loss was \$16,200. An estimated loss does not mean a total loss as the merchandise can be reconditioned and sold at a good profit; sometimes [89] 50% of the loss is recovered. The defendant was an expert salvage man and there was reason to expect quite a reduction of the loss. A salvage man does not always make a profit above his guarantee and I have known where a deficit was reported. A fire sale ordinarily enhances the value of a stock over its actual value for sale purposes—it might be 50%,

(Testimony of George C. Main.)

25%, or 10%—it might be nothing. As a rule, I should think it would enhance the value. The fact that it is a fire sale and highly advertised has some value over the actual value. With an experienced man, an expert like the defendant, it is difficult to state what the percentage would be, but I should say probably 25%. This, however, is pure guess and speculation.

Isaacs' guarantee to the complainants of \$18,100 did not represent the value of the salvage even at wholesale. I was disappointed with the small balance of \$1,049.81 paid the complainants by the defendant and so expressed myself to them. As a matter of fact this \$1,049.81 paid the complainants by the defendant amounted practically to only one-sixteenth part of the loss to them.

Isaacs undertook the sale of this stock and sold the merchandise as trustee for the complainants after their purchase of it in bulk for \$34,300 cash. The defendant proceeded to sell the entire stock. He made his final report to the complainants through me in the latter part of November, 1913 (Deft. Ex. "2-Q"), with a letter (Complainants' Exhibit "A"), which report I accepted without an opportunity to verify it, as Mr. Isaacs and his papers were then in San Francisco. After this statement was received, I saw him numerous times, but never signified any desire for a more detailed account of the receipts and disbursements in connection with the retail sale.

I think I was out of town at the time of the sale in bulk and had no knowledge that Isaacs was a bid-

(Testimony of George C. Main.)

der and bought the stock. He told me so afterwards. The fact that it was to be sold in bulk was talked over between the defendant and myself before it was advertised. I do not know how long before or when. He said that expenses were beginning to eat up the stock and that he thought it best to sell it under sealed bids and I agreed with him that there would be a loss in conducting the sale any longer. As to his method of disposing of it, it was wholly in his hands. I had nothing to do with it. He could do as he pleased. [90]

I told him, however, if it were put up at sealed bids it could go at a very low figure, that they would steal it from him. He said substantially that he would see that we were protected on that proposition; that he would put in a bid in his own behalf at a figure which he thought would represent the fair value of the assets as they then stood and that if any other bid came along that was higher than his the other party was welcome to it, because it would mean that the stock would bring all it was worth. There was nothing in this plan as he outlined it to me that I thought was objectionable.

I understood after the sale in bulk what he paid for it. I knew because I knew the amount of the inventory and his bid was something about eleven thousand dollars which was forty or forty-five per cent of the invoice, the original invoice price of the goods. I thought at the time it was a very good bid. Looking at it now it seems we might have done better.

The inventory of \$24,000 I did not make. Isaacs



(Testimony of George C. Main.)

made it. I understood perfectly it was based on the Bridge inventory price. I did not make it so I could not swear positively, but it was about 45% of the original Bridge inventory which I understood was the purchase price. When Isaacs took the inventory of the stock that was left after the retail sale, that was taken on the same basis as the original Bridge inventory of forty-five or forty-six thousand dollars, as far as I know, and I understood nothing was marked down on account of damage.

I have been an adjuster for twenty-five years and have done a great deal of adjusting for the complainants and am still doing work for them. I concluded that the first inventory had been fairly taken by Bridge at the original cost price, but much of the merchandise was old, some of the clothing at least twelve or fifteen years old, and many items were not worth anywhere near the original cost price. Ordinarily one days' notice of a sale is not customary and seems to me short, and would tend to cut out competition if the bidders had not been notified in advance. There are several [91] buyers right here where considerable competition is quickly obtained in the sale of large stocks of merchandise, and ready on short notice to examine a stock, figure on and bid for it. I have heard that Colsky, Buttnick and Westerman & Schermer put in bids. I thought at the time such notice was fair to complainants and sufficient and I have not changed my opinion on that. I went down to the store several times during the progress of the retail sale looking around to see how



(Testimony of George C. Main.)

the sale was going, but did not make any examination of the stock just before the sale in bulk.

At a retail sale the best merchandise sells first.

My stenographer told me that someone from the store came to my office every day with a bundle of sales slips. They might have been added up on my adding machine. I could not say whether, after being added up, they were left with my stenographer. These sales slips were never sent to me as a daily report by the defendant. I never received them as such. My office had nothing whatever to do with them except that the defendant used my adding machine.

By DEFENDANT'S COUNSEL.—In view of an adjournment and the reappearance of this witness on the stand, I ask that he produce as a part of his examination and cross-examination, the original inventory of Mr. Bridge, referred to in this examination, and proofs of loss filed by Mr. Bridge; and statements and correspondence between Mr. Main and the complainant companies, or whoever represented them at the time, in connection with this loss, and in connection with the arrangement with Mr. Isaacs for the handling of this stock, and in connection with the settlement made by Mr. Isaacs; and all correspondence in the possession of Mr. Main between himself and his principals, in which Mr. Isaacs' transactions occur in connection with the sale and are referred to—

You brought the documents that I asked you to produce, did you? Any papers of the character I

(Testimony of George C. Main.)

described in my demand?

A. Yes, all the original papers that I had.

Q. Have you got them here? A. Yes, sir.

Q. I ask that you produce them.

A. Here is all that I have got. There is a lot of stuff there which has no particular bearing on it, but all papers with reference to this claim are here.

(All of which were thereafter placed in evidence and consisting of the following:)

Letter of George C. Main to the complainants marked Defendant's Exhibit "2-T"; enclosing

Defendant's statement to the complainants marked Defendant's Exhibit "2-Q";

Report on fire loss of George C. Main to insurance companies marked Defendant's Exhibit "2-N."

Letter dated November 26, 1913, from D. Isaacs to George C. Main, marked Complainants' Exhibit "A." [92]

### **Testimony of Benjamin Goodwin, for Complainants.**

BENJAMIN GOODWIN, called for the complainants, testified as follows:

I reside in this city and am the Pacific Coast Manager of the American Central Insurance Company and was such during the year 1913 throughout all the happenings which are the subject of this action.

When we received our proportions of the one thousand odd dollars balance paid at the time the final settlement was made we received it as made in the regular course of business and accepted it as such. At the time of this final settlement this de-

(Testimony of Benjamin Goodwin.)

defendant did not communicate to us that he was the purchaser of a part of our merchandise, nor did he ever do so since or before that settlement. No report of his being the purchaser of any of this stock was ever sent to us to my knowledge. We never had knowledge of the sale in bulk until after the decision in the trial of *Seynei v. Isaacs*; that was our first intimation. That was a few days before the commencement of this action.

This defendant has never offered to show us his books or render a detailed statement of his trusteeship of this merchandise before the bringing of this action, or since.

#### Cross-examination.

I know George C. Main. He is an independent adjuster and we would refer an occasional loss to him to adjust; he is not one of our men, not a salaried employee. He has adjusted other losses for us, both prior to and after the Bridge loss.

We might have had, through our general adjuster, Mr. De Lappe, communications with Mr. Main concerning this fire loss and the transactions of the complainants with the defendant. I could not tell whether the adjustment was referred to the defendant by Mr. De Lappe or myself. The loss was referred to the adjuster soon after it occurred, according to our usual custom. If I took any hand personally in the matter it was through correspondence between my office and Mr. Main, and I cannot recall what I may have written at that time without looking through my files.

(Testimony of Benjamin Goodwin.)

Q. I ask the witness, if your Honor please, to produce the correspondence here for examination—any letters from Mr. Main to your company, [93] or letters from your company to Mr. Main and not returned, during the year 1913.

The COURT.—I will pass upon that question if the authority of this man Main is questioned later. I don't know as it is.

Mr. SCHLESSINGER.—With that we conclude the cross-examination.

Mr. OLNEY.—I presume your Honor's ruling will apply to each one of the heads of the other companies. However, I will ask the questions so as to complete the record.

### Testimony of J. C. Johnston, for Complainants.

J. C. JOHNSTON, called for the complainants, sworn.

Mr. SCHLESSINGER.—I shall ask your Honor to note that an objection has been made upon the part of the complainants to the introduction of that character of evidence.

The COURT.—It is an equity case and I am admitting it subject to the objection.

Mr. OLNEY.—Q. Mr. Johnston, you live where?

The COURT.—To save time, counsel will probably have no objection to your asking him the same general questions, all in one, that you asked the last witness, and ask him if his answers are the same. Have you any objection to that form of question?

Mr. SCHLESSINGER.—I would like to have it



(Testimony of J. C. Johnston.)

understood that the same questions were put to this witness and an objection made by counsel, and your Honor of course making the same ruling.

Mr. OLNEY.—And the same to each of the other witnesses?

Mr. SCHLESSINGER.—Yes, and a declination on the part of the plaintiffs to produce correspondence with Mr. Main.

Mr. OLNEY.—Then as I understand the stipulation it is that the heads of each of these companies, their answers to the questions shall be considered the same as those of Mr. Goodwin.

Mr. SCHLESSINGER.—They will have been deemed to have been asked the [94] questions, and the same objections made, and that his Honor makes the same ruling.

Mr. OLNEY.—Very well. Then we will excuse the heads of the other companies.

Mr. SCHLESSINGER.—Just a minute. I don't think that is quite far enough. Do I understand that it is not questioned now that George C. Main was the adjuster for these complainants?

Mr. OLNEY.—There is no such matter before the Court.

Mr. SCHLESSINGER.—Let the witness take the stand then.

Mr. OLNEY.—There is no question that Mr. George C. Main was the adjuster for those five companies upon this loss; there never has been any question.

Mr. SCHLESSINGER.—That is all then.



(Testimony of J. C. Johnston.)

Mr. OLNEY.—It has never been questioned at any time.

**Testimony of Sanford H. Horne, for Complainants.**

SANFORD H. HORNE, called for the complainants, testified as follows:

I am in the oil business occupying the position of manager of the concern. On February 23d, 1916, I remember going to the office of the defendant on California Street in this city at the request of Mr. Olney and witnessed a conversation there between Mr. Isaacs, the defendant in this case, and Mr. Olney.

I went down to the office with Mr. Olney and Mr. Olney went up to Mr. Isaacs and said, "Mr. Isaacs, I have come to ask for an accounting on behalf of the Insurance Companies in the matter of the Bridge stock."

The COURT.—What did Mr. Isaacs say?

A. Mr. Isaacs said, "So far as they are concerned, I am finished; they will get no accounting."

THEREUPON, COMPLAINANTS RESTED.

[95]

**Testimony of Lester Herrick, for Defendant.**

LESTER HERRICK, called for the defendant, testified as follows:

I am a certified public accountant and my office is in this city. At the defendant's request I have made an investigation of certain accounts and transactions appearing as having been carried on by Mr. Isaacs in connection with the salvage of Messrs. A.

(Testimony of Lester Herrick.)

Bridge & Co. at Seattle. I have made a report with respect to my investigation and have that report with me. It clearly presents all the information that we have obtained.

This report is correct upon the basis upon which it is prepared.

Mr. SCHLESSINGER.—We will ask that this be marked as our exhibit.

Mr. OLNEY.—Are you offering it?

Mr. SCHLESSINGER.—Yes.

Mr. OLNEY.—I object to it until we have the data upon which it was made.

Mr. SCHLESSINGER.—That goes to the weight of the testimony, not the admissibility of it.

Mr. OLNEY.—Conclusions of experts are not admissible in evidence until the foundation is laid for them by introducing the other papers and documents.

Mr. SCHLESSINGER.—Unquestionably if that is not shown it does not amount to anything. He testified to having made this from an examination of certain data which he specifically mentioned. That data is in court.

The COURT.—Do you expect to identify that later?

Mr. SCHLESSINGER.—Certainly, the testimony has gone in somewhat out of order, but you have no objection to that?

Mr. OLNEY.—I want to make my objection to this being offered in evidence; it is a long report; I have certainly got to examine it.

The COURT.—The objection, of course, is well

(Testimony of Lester Herrick.)

taken because the report is somewhat out of order, but if counsel desires to get through with the witness—

Mr. SCHLESSINGER.—I am simply wishing to expedite matters.

The COURT.—Of course unless the report here is substantiated by the testimony offered later, the Court will not consider it.

Mr. OLNEY.—I ask leave to ask the witness a few short questions.

Mr. SCHLESSINGER.—Oh, no, I shall object to that now because I will substantiate it. If it is not substantiated it may go.

Mr. OLNEY.—I want to ask this witness in regard to certain data that he has named. I am objecting to this report and I desire to examine the witness regarding his data.

Mr. SCHLESSINGER.—I object to any cross-examination at this time.

The COURT.—Proceed with your examination of the witness and if it is not substantiated I will strike the report. I will give you full opportunity for cross-examination. I will not rule upon your objection at this time, but I will admit it. If it is not substantiated it will be rejected.

Mr. SCHLESSINGER.—I will ask you whether or not in the course of your examination you examined a cash-book, or what purported to be a cash-book, covering the sales of 19 days.

A. Yes.

Q. I will ask you whether or not you examined the

(Testimony of Lester Herrick.)

entries in that cash-book.     A. I did.

Q. State whether or not they appear to have been made in the due and regular course of business.

A. They did in accordance with the method that was used.

Mr. SCHLESSINGER.—We will now offer in evidence this cash-book.

Mr. OLNEY.—We object to it on the ground the proper foundation has not been laid.

Mr. SCHLESSINGER.—It is the basis upon which he made his report. We will, [96] of course, supplement the evidence by a showing it was the cash-book kept by Mr. Isaacs.

The COURT.—The same course will be pursued.

Mr. HERRICK.—(Continuing.) With reference to page 5 of my Statement A and this item “Cash sales, as per statement B., \$17,779.60.” Those figures appeared upon page 68 of the book which has just been introduced in evidence, and appeared to represent the total daily sales during the period from September 6th to September 27th; they are entered as the daily totals and produce the total for the period you have just mentioned.

Mr. SCHLESSINGER.—I will ask you whether or not in connection with your examination you examined certain sales slips.

A. Yes.

Q. I will ask you whether or not those are the slips you examined.

A. Yes, those I believe to be all the slips that we examined.



(Testimony of Lester Herrick.)

WITNESS.—(Continuing.) These tags or sales slips, whatever they may be called, are somewhat poorly written and a doubt may exist as to the actual accuracy of every individual slip. These slips are itemized as to the amount of sales. This cash-book is not likewise itemized as to the character of sales. It simply exhibits one entry appearing as the total sales of that day. Taking September 6, 1913, the cash-book shows receipts of \$3,707.95. There is a discrepancy there of approximately \$10 between the slips and the cash-book. These slips bear serial numbers but not one complete series; they bear the numbers appearing in the various books. These sales tags or slips appear, so far as I could determine, to have been made in the due and regular course of business. They do not bear any evidence or earmarks or changes, obliterations or alterations, to any extent that would cause any suspicion. I refer to the integrity of the tags that are here.

Mr. SCHLESSINGER.—We ask that these slips be admitted in evidence.

The COURT.—They will be admitted assuming that they will be hereafter identified. It is merely a question of the order of proof.

Mr. OLNEY.—This is something that is going beyond the order of proof. He could bring in half of these slips; or he could bring in two-thirds of these slips. How do we know what he has left out? He has done this same thing before. He brought in slips in the other case—

Mr. SCHLESSINGER.—I object to any such statement.



(Testimony of Lester Herrick.)

The COURT.—I have already ruled. There is no impropriety in permitting this witness to testify out of order. Of course if the report is not substantiated by testimony offered later it will go by the boards and amount to nothing.

Mr. OLNEY.—But this is not the report he is offering now; he is offering in evidence the sales slips. [97]

Mr. SCHLESSINGER.—I am offering in evidence the sales slips.

The COURT.—For the purpose of showing the basis on which he made the report.

Mr. OLNEY.—Only on that basis?

Mr. SCHLESSINGER.—Unquestionably.

WITNESS.—(Continuing.) I found a salary expense account in the book just introduced in evidence. Neither the names nor purported names of clerks are therein given nor the amounts of salaries paid. The record is merely that all disbursements are made—specified as of one character or another. I examined the item “rent, \$920.” That appears as an expense of the enterprise and is supported by voucher in the following words:

“This is to certify that the rent of the premises on First Avenue South, Seattle, Wash., formerly occupied by A. Bridge & Co. was paid to us by the adjusters on October 27th, 1913, for the month of September, 1913, in the sum of \$920.”

The expense items are only partially supported by vouchers. There were some errors in statement as

(Testimony of Lester Herrick.)

compared with the book. I did not examine the defendant's bank-books but his statement of account with the Seattle National Bank. I found a deposit apparently unconnected with the sales of this business. This statement purporting to be the statement from the Seattle National Bank as to the period from September 6th to September 29th total deposits of \$19,744. I have received from Mr. Isaacs checks which I have here, drawn on the First National Bank of North Yakima, Washington, calling for a total amount of \$2,850, and it is evident that these checks were deposited in the Seattle National Bank. It is a conclusion not a statement of facts that these checks were indicated in those bank deposits. Regarding the cash-book, if I may suggest, I think it would be proper to designate that book as a record book more than a cash-book, inasmuch as it is simply an ordinary book that exhibits a simple, primitive, crude record of sales, and of disbursements, and of nothing else. It is pencil writing.

Mr. SCHLESSINGER.—Now, if your Honor please, I will offer in evidence a cloth covered book—I might do this to shorten the offer, I might offer in evidence all of the books and records appearing upon page 1 of Mr. Herrick's report.

The COURT.—They will be received for the purpose of identifying them as the books forming the basis of the report; but will not be admitted as evidence until they are further identified. [98]

Mr. OLNEY.—That ruling, I presume, applies also to the sales slips.

(Testimony of Lester Herrick.)

The COURT.—That refers to everything in his report.

Mr. SCHLESSINGER.—Mr. Herrick, from your examination of these records and data submitted, are you satisfied that the statement rendered, that is, is it your opinion that the statement rendered by Mr. Isaacs to the insurance companies was correct?

A. My opinion is based entirely upon the evidence which has been presented to me, and so far as I can form an opinion from an examination and careful consideration of these papers this statement was correct.

Mr. SCHLESSINGER.—Now, your Honor, we will ask that these records, and data, documents and papers, specified on page 1 of the report of Lester Herrick be admitted in evidence.

The COURT.—All these papers referred to by this witness will be marked in some way to identify them as the papers which he used in making up his report.

Mr. SCHLESSINGER.—I think your Honor has ruled that these may be admitted as one exhibit.

The COURT.—I am only admitting them conditionally. I am admitting them for the purpose of identification in connection with this report.

#### Cross-examination.

I was employed some three weeks ago. The examination was not entirely made by me but under my direction. The report is made up from these slips and books exactly as I originally found them. The examination, as appears upon the first page, was

(Testimony of Lester Herrick.)

investigation and a partial conclusion on the termination upon all the things that were furnished that appeared to have anything to do with the preparation of a statement of this transaction; and they are all recited on the first page. They mainly consisted of this cash-book or record-book and the sales slips and these vouchers.

My report has been made up from what has been furnished me. I don't know what has not been furnished me.

Q. You did not compare each separate sales slip?

A. There is nothing to compare it with.

Q. That is what I thought.

A. What could there be that they could be compared with, unless there was a complete record of the individual sales?

Q. There is no complete record, is there?

A. No, there is none.

Mr. SCHLESSINGER.—Except as appearing on the slips themselves?

A. Well, there is nothing appearing on the slips themselves except a showing of the sales that they are presumed to evidence.

Q. Did you also see the original adding machine totals of the slips? A. No.

Q. Or cash register totals?

A. No, nothing except what I have referred to.

Q. Then you saw no other records than these slips and these books? A. No.

Q. If any slips were missing, Mr. Herrick, they were not entered in the book, were they? You do not



(Testimony of Lester Herrick.)

know how many slips were missing, do you?

A. No, I don't know whether any slips were missing or not. [99]

Q. You simply made up your report from the slips that are here? A. Yes.

Q. You had nothing to check up those slips?

A. Nothing except the entries which are made in this book which appear to represent the daily total of the sales. I don't know but that there might have been slips containing entries of sales which are not here, but there is nothing to indicate that there were, and there is additionally the indication of these entries, unless they are false, that these are all of the slips that there were. This book seems to be mixed up with a whole lot of other accounts.

Q. Mr. Herrick, if it should appear that upon this sale for which these sales slips have been produced here there were indexes made by each clerk showing the amount of each individual sales slip, and the total cash sales, and which was turned in each night to the defendant, should not those indexes be produced here and accompany these sales slips in order to make a complete record?

A. Yes, that is a customary salesmens' book. These books contain usually 50 of these slips with carbons and there is also in the book a sheet having lines and numbered spaces from 1 to 50, for the purpose of taking an entry of the total of each individual sales slip, and upon the conclusion of the day or the completion of the use of the slips, he figures his total and it becomes a record that enters into the



(Testimony of Lester Herrick.)

entire record constituting an audit of the transactions of the day.

The COURT.—Totaled up by the salesman?

A. It is totaled by the salesman and returned first to the proper office and in an organized institution becomes a part of the organization records of the business of the institution.

Q. These sales slips in the book are removable?

A. Yes.

Q. This index in the book is returned at the close of the day to the cashier?

A. Yes, that is the proper practice.

Q. And that is the only method, as you say, as a matter of audit, by which the sales slips themselves, could be checked, the salesmen could be checked?

A. It is not the only record.

Q. It is the chief record to check the sales record?

A. Yes. It is the means of carrying out the check of individual sales to the complete recapitulation.

Q. It also checks up the sales slips, does it not?

A. Yes.

Q. Your report, I believe, does not include these indexes? A. No.

Q. There were none such furnished you?

A. No.

Q. I believe you also stated you did not have furnished you any of the original adding machine totals or cash register totals of these sales by which they could be checked up? A. No.

Q. I believe you stated also your report was based upon copies of deposit slips and not on the originals; that is so?

(Testimony of Lester Herrick.)

A. Yes, referring to the deposits appearing to have been made in the Seattle National Bank during this period, that is true.

Q. You don't know where they came from or anything except that they were produced for your examination?

A. I don't know where they came from.

Q. Then your only knowledge of the North Yakima deposits in this bank are the four cancelled checks of September, 8, 9, 16 and 22, which have been produced in court here?

A. And the checks themselves.

Q. Your only knowledge of these deposits are the four individual checks that have been produced here?

A. Yes, these checks which have been presented here upon the North Yakima bank, making a total amount of \$2,850, are evidenced by the endorsements [100] thereon that they were deposited in this bank and they correspond with the entries on these copies of the deposit slips. Upon the basis of that information, I have concluded that the deposit embraced these particular checks.

Q. Have you examined Isaacs bank-book of the Seattle National Bank, and the stubs of his check-book covering the period of your report?

A. No, I have not.

Q. Those were not produced to you and they were not among the data which you have offered?

A. No, I have not seen them. I relied upon this statement purporting to be a statement from the

(Testimony of Lester Herrick.)

Seattle National Bank of the entire account from its beginning to its conclusion.

Q. Please tell me from your data, Mr. Herrick, the number of suits sold during the insurance sale.

A. I have no information on that subject.

Q. Or the number of boots and shoes?

A. I have given no attention to that phase of the matter.

The COURT.—Mr. Herrick has stated substantially the records and documents upon which his report is based, and I assume that he had no information outside of that.

A. My report is complete from beginning to end.

Mr. OLNEY.—Weren't you instructed to prepare totals of the quantities of the various articles of merchandise sold at this sale in order that the same might be checked up with the inventory?

A. I was not.

Q. Will you look at this book of records, Defendant's Exhibit "C," which you yourself say cannot be called, as I understand it, a cash-book?

A. It is a combination cash-book, journal and ledger.

Q. If this book is made up from the total cash in the drawer each night at the conclusion of business, then is it not also an incomplete record in that it might not show the sums of money taken out during the day, or not put in the drawer during the day?

The COURT.—I do not think it is necessary to ask an expert witness to deduce conclusions which are inevitable.

(Testimony of Lester Herrick.)

Mr. OLNEY.—The only object of the examination is that the decisions are very strong that a trustee must keep proper books of account of the trust fund—

The COURT.—If money was taken out of there, the book, of course, does not show it. His conclusions do not amount to anything. You are asking him to deduce a conclusion which is self-evident to any man.

WITNESS.—(Continuing.) From a standpoint of proper and complete accounting, the records shown in the cash-book are crude, primitive and unsatisfactory. However, the main point is their integrity. A business continuing indefinitely could not proceed with such records. Taking into consideration that this is what we call a hurry up proposition; there is no organization of accounts or otherwise, whereas the entire transaction lasted three weeks. It appears to have been the intent of the defendant to keep an honest record, and I see nothing indicating the contrary. Frankly answering your question the record is a very abominable accounting.

The bank deposits show an excess of about \$900. This item of \$900 is not of very much consequence. It is indefinite. By a consideration of the [101] money appearing to have been received by Mr. Isaacs from this sale, with a deduction therefrom of the payments appearing to have been made by him, there is left a surplus of money apparently received and available for deposit. The amounts as deposited



(Testimony of Lester Herrick.)

were about \$900 more than this available balance. Mr. Isaacs has made explanations to me but simply by word of mouth, so therefore, the only considerations of that \$900 that can be fairly given is that the deposits in the bank exceeded the amount available and that the final deposit may have embraced some other money. [102]

### **Testimony of David Isaacs, in His Own Behalf.**

DAVID ISAACS, called in his own behalf, testified as follows:

For the last fifteen years I have been engaged in the business of adjusting fire losses, handling salvage merchandise for the account of insurance companies on a basis of 20% to myself plus expenses when I handled stocks on guarantees. About the 15th day of August, 1913, pursuant to a telegram from George C. Main, I left San Francisco for Seattle. When I arrived there he presented me with an inventory of the Bridge stock and asked me to examine the goods and report to him. My report to him was the goods were subject to considerable depreciation; that the stock was old and the inventory inflated; that the value of the goods before the fire was in the neighborhood of \$34,000, and that in my judgment the fire loss was \$16,000. Main asked me what was best to do. I told him if Bridge's assignee would not accept that figure, if he could get the sound value of the merchandise down to where it belonged, viz., \$34,300, and the use of the premises to run a sale, I would advise the companies to take over the



(Testimony of David Isaacs.)

stock at that figure and guarantee them \$18,100 above my commission of 20% and expenses on a sale of the stock. I, thereupon, returned to San Francisco. Subsequently, Mr. Main notified me of the acceptance of my offer, and on the 5th of September, 1913, accompanied by my wife and daughter I returned to Seattle with a certified check for \$18,100, which I gave to Mr. Main, and I, thereupon, took possession of the stock under my guarantee and proceeded with the sale which opened on the 7th of September, 1913.

Before I returned to Seattle I engaged a Mr. Bass of Portland, instructing him to go to Seattle and take possession of the stock, had the keys turned over from Mr. Main, telegraphed Mr. Sidder to engage Mr. Seynei, and for both of them to engage the necessary help to mark the goods for sale and put them in good condition, and to start the sale as soon as possible; all of which they did.

They had not arranged for a cashier, however, and I asked my wife and daughter to act as such. [103]

I went along with the sale. The sale was a success to begin with. The first day's receipts were \$3,700 odd dollars; the next day they were \$1,600, and it kept going down and down. I said to Main it is running down as low as \$400 or \$500 a day, the average daily expenses were over \$200, and the stock being all broken up and about a week before the retail sale ended I spoke with Mr. Main about discontinuing it. I told him we couldn't afford to continue the sale much longer and that the best thing to do would be to finish the rest of the week and then sell

(Testimony of David Isaacs.)

the stock out in bulk. He said: go ahead, use your own judgment; Isaacs you know what will happen to that stock if you sell it in bulk to the merchant here; they will steal it; I don't think you will get 30% for the stock. I informed him that I anticipated going in business in the northwest and that, provided I could get a lease on the premises, I suggested that I would put in a bid on this stock myself in the name of some other person, and that if anyone is willing to pay more than I, they are welcome to the stock. Mr. Main asked me how I would conduct that sale and I said, "I will notify all the merchants in Seattle and the surroundings, accustomed to buying and dealing in that class of merchandise." He said, "Very well; go right ahead," and I immediately notified all the merchants who I thought were interested, Wasserman & Schirmer, Kessler, Colsky, Cone and Buttnick. I received about eight or ten bids. Wasserman & Schirmer bid 25%, Colsky \$4,200, Cone bid between 25% and 30%, Kessler's bid was 30%, Buttnick bid between 25% and 30%. Brenner Bros. of Bellingham, Wash., made an offer of \$10,000, conditioned that they could get the premises for continuing the sale, which I could not accept under those conditions.

These bidders came up to the store before the sale. I showed them the original inventory given to me by Main. I told them they would have to examine the goods and judge by that inventory. I told them I would take an inventory of the goods that were left at the close of the sale but I could not guarantee the

(Testimony of David Isaacs.)

amount of the goods that would be left.

I also put an ad in the "Times" on Sunday. I did not think this would do any good but thought it was the proper thing to do.

Monday morning I gave to the merchants who came in the store a copy of the [104] inventory taken of the goods that remained and informed them the bids would be opened at 2 or 3 o'clock, I don't remember which. At the request of the bidders the time of the sale was continued for one hour, and I waited that hour. There were probably 50 persons in the premises at the sale. When the time of the sale arrived, all of the bids were opened and read in the presence of all the people on the premises. My bid was 45%. It aggregated \$11,094. I told Mr. Main 3 or 4 days before the close of the retail sale I would bid over forty, or forty-five cents on the dollar. I intended to continue with the sale under the name of Mr. Seynei. He was to run the store for me.

I discussed with Mr. Seynei 3 or 4 days prior to the close of the retail sale the proposition of continuing the sale on my own account and he and I went over the entire matter, that is, the amount of the stock I would have to carry in order to properly conduct the business; also the probable expense thereof.

In the conduct of the retail sale for the insurance companies I gave no instructions to any of the retail clerks how they should return their sale accounts, leaving everything to Mr. Seynei who had charge of the conduct of the sale during those 19 days.

(Testimony of David Isaacs.)

I have possession of all of the original sale—slips—some 10,000. They are in the handwriting of the various clerks, and, at the end of the retail sale, they were taken by me from Mr. Main's office where they had been taken by Mr. Bass and my daughter. We used his adding machine. I have not altered or in anywise changed any of these slips, and to the best of my knowledge and belief they represent all of the slips of the sales during the nineteen days.

When I arrived in Seattle, Mr. Bass handed to me Defendant's Exhibit "C" (the record-book), and I found those entries there on page 184 under date August 3d, showing the petty cash advanced by him. On page 68 thereof we entered all the matters pertaining to the sales people, showing the day they started to work, part of which is in my handwriting.

Mr. SCHLESSINGER.—Q. Look at your original records, if you will, and give us the names of your employees and the amount paid them, and then give us the exact totals.

Mr. OLNEY.—We further object unless it appears by whom this record was kept.

Mr. SCHLESSINGER.—Is that (Defendant's Exhibit "C") in your handwriting?

A. Part of it. [105]

Q. Was that kept in the due and regular course of business of the 19 days' sale? A. Yes.

Mr. OLNEY.—How much of it is in your handwriting?

A. The first week is not in my handwriting; part of this is in my handwriting.



(Testimony of David Isaacs.)

Q. What part?      A. That material there.

Q. The first item, page 68, that is in the handwriting of yourself?

A. Yes; that is taken from the back of this book.

The COURT.—I understand that; you stated that yesterday.

A. Carried over; this is in the handwriting of the gentleman I sent up to take charge of the place.

Mr. SCHLESSINGER.—This book was used by you in the regular course of business?      A. Yes.

Mr. OLNEY.—We object to the evidence of the witness in so far as he is testifying from records kept by some other person.

The COURT.—Who made the other entries?

A. A man by the name of Bass.

Q. From what source did he make them?

A. From the accounts that were given to him; part of them were made before I got there and then when I arrived, the names of the various employees were entered there, and Mr. Seynei told me how much to pay to these various employees; he entered them in the book—stood alongside of me at the desk Saturday night when we paid off the help, Mrs. so-and-so so much and that money was handed to that lady—then he would enter her name and the amount.

Mr. SCHLESSINGER.—You examined that book from time to time and used it in connection with your business?      A. Yes.

The COURT.—The objection is overruled.

The labor the first week was \$270.11. The total amount paid for labor as appears from this exhibit



(Testimony of David Isaacs.)

during the retail sale is \$1,654.71.

Mr. SCHLESSINGER.—Now, Mr. Isaacs, how did you pay your labor account there during those 19 days?

A. Paid them cash out of the drawer Saturday evening.

The discrepancy of \$8 or \$10 between the sales noted in the cash-book on September 6th, and that of the sales slips themselves for the same day, I will tell you how that could be accounted for by a part payment being made on a suit at the time of sale, and the balance on delivery. The check for the sale not going into the cash of that day's sale. I cannot account for the difference between the total cash represented by me to the complainants as having been taken in by me at the retail sale and the amount of the sales as appears by the sales slips amounting to \$8.60. I might account for it in this way by refunding to the purchaser a dollar or two where complaints were afterwards made that the goods sold were damaged.

Mr. SCHLESSINGER.—Q. Have you examined the first inventory? A. Yes.

Q. Does it purport to give the number of articles on hand at the store at the time you entered it?

A. Yes.

Q. Did it give it item by item? A. Yes.

Q. Does it give the number of suits sold?

The COURT.—I presume the inventory speaks for itself.

Mr. SCHLESSINGER.—I simply want to lead up

(Testimony of David Isaacs.)

to it. Does it give the number of suits sold, for instance, the number of suits on hand?

A. The number of suits on hand, yes. [106]

Q. Are you able to state the number of suits on hand at the time you entered that store, according to the inventory? A. Yes.

Q. Will you please state the number of suits?

A. Get me the inventory. The inventory starts with total No. 1, showing so many suits at so much.

Q. Taking that as the principal item, what is shown there as to the number of suits on hand when you entered the store?

A. There were 1,577 suits of clothes.

Q. I will ask you whether or not you have examined these sales slips to ascertain the number of suits sold by the clerks during the retail sale?

A. Yes.

Q. What do the sales slips show in that regard?

A. The sales slips show 470 suits sold.

The COURT.—Out of a total of how many?

A. 1,577.

Mr. SCHLESSINGER.—How many suits were left at the tail-end of the sale?

A. The inventory shows 1,112 suits.

Q. That is what you bought at the bulk sale?

A. Yes.

Q. Now I will take the next item, overcoats: How many overcoats were on hand according to the Bridge inventory when you entered the store?

A. 332.

Q. How many overcoats were sold, according to

(Testimony of David Isaacs.)

the sales slips made by the various clerks?

A. 173.

Q. How many did you take over in the bulk sale?

A. 213.

Q. Now, take the next item, shoes, according to the Bridge inventory: How many shoes were on hand when you entered the store?

A. They are designated as shoes and rubbers; there were 1,981 pairs.

Mr. OLNEY.—We object to this, if your Honor please, because my recollection is that the rubber goods and the shoes were entirely separate.

Mr. SCHLESSINGER.—If you want them segregated we will segregate them.

The WITNESS.—They are the shoes and rubber boots; they were put in that way. The closing inventory, meaning the second inventory, showed 856 pair; the sales-book showed 1,146 pair sold.

Q. How many were left over after the bulk sale?

A. 856 pair.

Q. Take the next important item, underwear?

A. That is designated as shirts, underwear and overshirts; there were—

Mr. OLNEY.—That is furnishings?

A. That is furnishings; they consisted of various items, but I have the other parts of the furnishings.

Mr. SCHLESSINGER.—Q. Just read the next important item.

A. The shirts and underwear show—

Mr. OLNEY.—I would like to have the shirts and underwear separated.

(Testimony of David Isaacs.)

Mr. SCHLESSINGER.—You can do that on cross-examination; if you want to refer to every collar and every single sock you can go ahead and take your time and do it then.

A. There were 7,745 pieces; the closing inventory showed 2,669 pieces; the sales-book shows 4,910 pieces sold. Socks, 3,101, in the opening sale; the closing inventory showed there were 65 pair left; the sales slips show 2,990; gloves and mittens, 919 pair, closing inventory showed 355; the sales slips showed 437.

Q. Go right on and complete the list of items.

A. Handkerchiefs and mufflers, 677—this is the opening; the closing number was 56; sold by sales slips, 467.

The COURT.—Are there any important items remaining?

Mr. SCHLESSINGER.—No, they are unimportant; it would simply tend to show the absolute integrity of the accounts.

The WITNESS.—May I answer further with reference to this, there are a few items that are over and a few items that are short.

Q. Explain that to his Honor.

A. Some of the items show, for instance, the suits show that there were 56 more than I ever received; on the pants it shows that there are 64 pair short of what I received; on the overcoats it shows that there is 54 more than I had received according to the inventory. In the underwear, there was some of the goods entirely obliterated, which were stated in the



(Testimony of David Isaacs.)

original inventory as handed to me, and also shown in the other depositions taken, amounting to about three or four hundred dollars, although they were itemized as merchandise being on the premises at the time of the fire [107] and counted as such, and nevertheless they were never turned over to me, because they were entirely burned up. I have not deducted that amount, because it would be impossible for me to so; the underwear went at various prices, and it would be impossible for me to state how many pieces—

Mr. SCHLESSINGER.—I think you have given sufficient about that and counsel may cross-examine you on it if he cares to do so.

The WITNESS.—If I may state, your Honor, the fire had burned through the premises.

The prices of the second inventory compared exactly with the prices of the first, and as to quantity it corresponded with the goods that were left. By these sales slips I have also determined the actual amount of goods sold by each clerk, and I can give the amount for the Court's benefit.

The COURT.—I do not see any necessity of going into it unless counsel desires to go into it on cross-examination.

WITNESS.—(Continuing.) After I purchased the stock in bulk I had conversations with Mr. Main as to the amount I paid for it, and on two different occasions went over with him the various items included in my statement as appears in the amended complaint. Before rendering the final statement I



(Testimony of David Isaacs.)

called on Mr. Main and told him the reason I was unable to send him a complete report of the transaction was because there were two items—advertising and light bills—that had not been settled and had to be adjusted. At that time I informed him of the amount of the sales and the commissions. I figured with him the amount of my commissions on both sales, retail and bulk, at 20%. He made no objection to that charge. We also spoke of the net proceeds to the complainants and I told him as soon as I had the final figures I would send him a statement from San Francisco with a check for the balance to the complainants. The date of the statement was the 29th day of November, 1913. He never raised any objection to any of the items in that statement. The amount of \$28,901.92 represents in full the total amount received by me both from the retail and bulk sales.

Q. I will ask you, Mr. Isaacs, whether or not you paid out the rent, that \$920 referred to in this voucher No. 1.

The COURT.—That is admitted, I understand. Mr. Seynei testified to that.

Mr. OLNEY.—There is no question about that.

WITNESS.—(Continuing.) I also paid \$66.88 for light; \$54.59 for insurance; \$1,204.21 for advertising, and also advanced the further sum of \$47.26; vouchers for all of which I have here. The amounts thereof are correct. [108]

I turned over the goods I purchased in bulk to Seynei & Co. for the same amount I paid for them,

(Testimony of David Isaacs.)

not allowing Seynei & Co. any part of my commissions. The expense of running a retail sale amounts to a fraction over 23%, and is the ordinary expense of conducting a sale of that character. In that sale I tried to do the best I could. I made no charge for the services of my wife and daughter.

The usual expense of conducting a business as was conducted by Seynei & Co. is between 25% and 26%. Some will run to 30%.

I will say that this tag from Plaintiffs' Exhibit 1 has never been on a coat. It could not have been in the condition it now is if it had. It is a physical impossibility to put that tag on a coat as it is supposed to be put on for the purpose intended and taken off without being destroyed. Since rendering this statement in November, 1913, I have met Main twenty-five or thirty times. I think in June or July, 1914, I had a conversation with Mr. De Lappe concerning this accounting. I told Mr. De Lappe that I was approached and told if I didn't give up a certain amount of money, certain books and papers would be turned over to the insurance companies and trouble would be made for me and this case would come along. I told him, I says, "Now, Mr. De Lappe, there has been a question about this accounting; you do not want to put me to any expense or trouble, and you do not want to go to any expense or trouble." I said, "I have the data, the entire data, and it can be checked up" I says, "If you will get an expert accountant I am willing to pay all the expense—please check it up, have the account checked

(Testimony of David Isaacs.)

up"; he said to me, "Now, Isaacs, if we want that account, we will let you know."

Mr. SCHLESSINGER.—Mr. Isaacs, there had been a suggestion made here that you secreted some of the goods, or did not expose them on the shelves, on the tables; what is the fact in regard to that?

A. No such thing ever existed; it would have been impossible to do it.

Q. I will ask you whether or not at any time you so arranged the contents of that store as to depreciate the value of the stock.

A. I at no time had any occasion to handle the stock; it was always handled by the clerks.

A few days before the retail sale was over there were a lot of pennies, nickels and dimes that I had no place to keep in the store, and they were too bulky to take to the bank and at this man's, Seynei's, suggestion, I put them in the safe belonging to a man by the name of Aaronson, [109] who was in business across the street. Otherwise, I kept the money in a safe deposit vault during the busy season and deposited it the following morning in the bank.

I never had any talk with Mr. Seynei with regard to the elimination of any bidder at the bulk sale. I never told him that the stock purchased by me in bulk was actually worth \$24,000; that I had made a successful purchase from the complainants and had the best of it, or that it was worth one hundred cents on the dollar.

Before the retail sale commenced I deposited a check of \$1,000 in the Seattle National Bank. I also,

(Testimony of David Isaacs.)

after the sale commenced, deposited with the Seattle National Bank other sums of money unconnected with the retail sale, which I received by check for merchandise sold at different places on different sales. (These are the four North Yakima checks referred to in Herrick's Report and were thereupon offered in evidence.)

Mr. OLNEY.—Q. So you commingled the funds from this sale of merchandise with your own individual bank fund?

A. I kept the account in my own individual name.

Mr. SCHLESSINGER.—We will offer in evidence the various slips, documents and data identified by Mr. Herrick yesterday afternoon and referred to specifically on page 1 of his report.

Mr. OLNEY.—We object to the admission in evidence of these on the same grounds as offered to the partial offer of these other copies. These are not original records; every one of them are copies; the originals are unaccounted for. As far as this Exhibit "C" is concerned, it appears that most of the book is in the handwriting of a bookkeeper and kept by a bookkeeper who has not been produced upon the trial of this action. The nonproduction of the bookkeeper is a presumption against this defendant.

The COURT.—Under the testimony the book was kept under the immediate supervision of the defendant; he paid the money and the bookkeeper made the entries there, practically in his presence. I will overrule the objection to the book. I will admit the sales slips in evidence upon the identification made.



(Testimony of David Isaacs.)

The different receipts and vouchers the witness has testified that he paid I will also admit. The objection to the deposit slips will be sustained.

Cross-examination.

Mr. OLNEY.—Q. Is it not a fact that Mr. Main never saw any of these sales slips?

A. I was not there when they were delivered to him.

Q. To refresh your memory I read you a question by Mr. Olney to Mr. Main with reference to these sales slips, and his answer:

“Now I want to make that evidence perfectly clear in regard to these sales slips referred to by counsel: These sales slips were never sent you as a daily report by this defendant?

A. No. [110]

Q. You never received them as such?

A. No.

Q. Your office had nothing to do with them except that he used your adding machine?

A. Nothing whatever.”

Does that refresh your recollection?

A. That is what he says.

WITNESS.—(Continuing.) I had two cash registers on that sale. I had no adding machine totals although the sales slips were sent to Mr. Main's office to be added on his machine.

Q. Is it not true, Mr. Isaacs, that if you had not lost or destroyed these totals made daily, that is the record which should show all these sales?

A. That is not true.



(Testimony of David Isaacs.)

Q. I say if you had them here, that would be the record which would show this?

Mr. SCHLESSINGER.—That is a matter of argument.

The COURT.—I do not care about any argument with the witness on cross-examination.

WITNESS.—(Continuing.) I have not the sales tags that were on the clothing showing the cost price and selling price; they were not kept; they were left on the sold garment. They would show the cost; they had a code mark on. These sales slips show the selling price; what they were sold for. I had the salesmen's indexes; they were left in the back of the books. They are to protect the owner or seller of goods from stealing by salesmen; they check up the daily sales, and they check up these sales slips. The sales slips are original and the index cuts no figure whatever; it would not show whether it was a suit of clothes or a pair of pants or a collar button. The sales slips show what articles were sold and designate the totals.

I could not say whether it is a fact that Mr. Main was in Vancouver, B. C., adjusting a loss there for two weeks immediately preceding the sale in bulk.

I had another accountant working on this job several weeks before the appointment of Mr. Herrick. His name was Dolge. It is not a fact his report to me was rather disappointing.

I first met Mr. Main in Wallace, Idaho, about 6½ years ago. I have known him ever since. I was never interested with him in any corporation. [111]

(Testimony of David Isaacs.)

I had a stock company and I tried to sell him some of my stock. He did not own any of that stock. I laid aside \$4,000 of stock for him subject to his wish to purchase it, in my Coast Fire & Marine Salvage Co., formed for the purpose of handling salvage merchandise. That corporation is the same corporation under which this sale involved was advertised in the "Seattle Times."

Mr. Seynei and I had no other merchandise in view at the time we formed our partnership. I was to handle any kind of merchandise. The second inventory was made under my direction for the purpose of selling the stock to whoever would pay the most for it. It was made under my instructions. I did not take one item of it. The item "balance" shown on page 1 of Plaintiffs' Exhibit 6 is not in my handwriting. It was written in later.

Q. Now, Mr. Isaacs, you sold the Bridge stock for \$15,468.00 more than you paid for it; was that fair to these complainants?

Mr. SCHLESSINGER.—I object to that as not being proper cross-examination.

The COURT.—I will sustain the objection.

Q. Didn't this very Court in which this case is pending within a year establish the tail-end of this stock after the insurance sale of three weeks and after the H. C. Seynei sale of seven weeks as of the value in the inventory as \$16,633?

Mr. SCHLESSINGER.—I object to that as not being cross-examination and an attempt to prejudice the mind of the Court.

(Testimony of Florence Cohn.)

The COURT.—It is a matter of record that the Court did so decide.

Mr. OLNEY.—I withdraw the question.

WITNESS.—(Continuing.) About four years ago there was an investigation by other companies than the complainants of Mr. Lloyd, an adjuster, at Portland. At that time the Phoenix and Hartford asked me about the purchase of some land in Oregon or Washington, somewhere up there, that I bought an interest in.

Q. But your integrity was very thoroughly questioned at that time, was it not?

A. I proved my contention, that I bought an interest in a piece of land and I had a deed, etc., to it, and that is all.

### **Testimony of Florence Cohn, for Defendant.**

FLORENCE COHN, called on behalf of the defendant, testified as follows:

The defendant is my father. I helped take the cash. Each clerk [112] had a sales book, which was numbered, containing 50 blank sheets and a stub (index) in the back. When a sale was made the amount and character of the goods were written on the slip and put on file. An entry of the amount of the sale was made on the stub, and these books each night were left at the desk and on the following day a new book was given the clerk. The next morning we checked up the previous day's sales slips with the stubs to see if the clerks had added their books correctly and to find out whether they corresponded

(Testimony of Florence Cohn.)

with the amount of the sales slips. We also compared the stub with the slips to see whether any slips were missing. Mr. Bass and I then took the sale slips to Mr. Main's office where we added them on his adding machine to get the total sales, and we left them there. No one in Main's office assisted us and I never saw them again. Each day's sales were tied up in separate bundles, and after getting the adding machine totals, we went back to the office to ascertain whether the result that we obtained from the adding machine corresponded with the amount on the stubs. After that the stubs had served their purpose and we had no further use for them. We had no further use for the adding machine totals which we crumpled up and threw away. If a clerk had only used part of a book after it had been checked up, later on we gave him back the remaining portion.

On several occasions everything that was in the drawer was counted. There was always a notation made of how much money there was in the drawer.

I had nothing to do with the cash-book. I could not say if a comparison was made between the amount of money in the drawer and the amount indicated by the sales slips as daily receipts. I could not say if the amount in the cash drawer corresponded to the amount designated in the sales slips.

THEREUPON, DEFENDANT RESTED. [113]



**Testimony of John Jeremy, for Complainants (In Rebuttal).**

JOHN JEREMY, called by the complainants in rebuttal, testified as follows:

It is perfectly possible to put on or take off the tag which Mr. Isaacs testified could not be taken off without tearing. That is the way it is put on (illustrating). I have now put it in shape where it could have been on a piece of clothing and taken off. It don't have to be torn; just untie it.

When a sale was made these tags were taken off. The number of the tags was what we went by for the commission that we were to receive for the sale of the garment; these tags were taken to the cashier, at the same time that we took the merchandise, and either O.K.'d by Mr. Seynei or by Mr. Isaacs, and we kept these tags until Saturday night. The clerk kept these tags until Saturday night, and they were handed over to Mr. Isaacs or Mr. Seynei to be examined, and we could get our commissions on them; this was a part of our salary. That is the only commissions we received, on these tags. If we lost one of these tags it was that much loss. When the tag was surrendered that was a receipt for our commission. And it was so with the other salesmen.

Q. Now, Mr. Jeremy, I want you to explain to the Court how an agent or cashier by losing or destroying these sales indexes which have been referred to on this trial, could profit. Just take this book and take this book and take this package of sales slips at



(Testimony of John Jeremy.)

random and explain to the Court how that could be done.

A. These sales slips were furnished to us the first day of our sale. On that day we were given a sales book. The clerk's number was on the left and the date on the right. A carbon was inside of the two; both went up to the office together; one went to the customer and the other remained in the office with the cashier. The indexes showing the total number of sales were totaled up for the day by the salesman. If 17 sales were made we totaled up on number 17 in the index. On the next day, the second day, we got a new book; and on the next or third day we got the old book back again we had on the first day, with a new index which indicated the number of sales you sold on the first day whether it was 75 or 13 or 24. We never went by the book; [114] we simply went by the index. If there were 6 or 7 sales slips missing from the book, we had nothing to show; we simply had the index for the receipt.

Mr. OLNEY.—I don't know as the Court understands the explanation of the witness or not. I might ask the Court if he understands the explanation of the witness in regard to this matter; if it does not, I would like the privilege of asking him to go into it somewhat more in detail. It is a very important matter.

The COURT.—That is clear.

Mr. OLNEY.—That is all.

Cross-examination.

Mr. SCHLESSINGER.—Q. Do you testify from

(Testimony of John Jeremy.)

your own knowledge that that tag was ever put upon a piece of clothing or other article and taken off?

A. Yes.

Q. Who took it off?

A. The salesman took it off.

Q. What salesman?      A. It has got my name.

Q. Did you take it off?      A. Yes.

Q. When did you take it off?

A. During the sale.

Q. Where did you get this from?

A. Off the merchandise.

Q. How long have you had this in your possession?

A. I never had it in my possession.

Q. Where did you get it from?

A. I got it right here.

Q. Did you take this off yourself?

A. Yes, just now off that.

Q. Did you take this off a raincoat personally?

A. That is my writing on it.

Q. Did you take this off a raincoat personally?

A. I must have, because it has got my writing on it.

Q. Did you take this off a raincoat personally?

A. My writing is on it, and that is proof.

Q. When did you take it off?

A. I could not tell you the date.

Q. After you took it off what did you do with it?

A. Handed it to the cashier.

Q. Did you ever see it after that?      A. No.

Q. Could you identify the raincoat you took it off?

A. God knows where it is now.

(Testimony of John Jeremy.)

Q. It did not contain any other marks or mark than this,—the mark that is on there?

A. No, but I am well acquainted with the merchandise, I marked things myself, and I surely know.

Q. I will ask you to examine these other tags and state whether or not they appear to be ragged in form?     A. They are all O.K.

Q. Does that appear ragged in any way?

A. That is new merchandise.

Q. Was not that raincoat in the store?

A. It [115] was in the store.

Q. It was in the store?

A. But these are suits, and that is a raincoat.

Q. Did you tear this off carefully or just rip it off in the usual way?

A. It don't have to be torn off; just untie it.

Q. Did you untie it in that way?

A. That is a new raincoat.

Q. Have you ever examined that since the time you took it off, except to-day?     A. No.

Q. This is the first time you have examined it?

A. This is the first time.

WITNESS.—(Continuing.) I made the biggest commission in the house. I should say I averaged as commissions three dollars a day.

Q. The amount of cash that you sent to the cashier corresponded with your slips?

A. I never knew of anything different.

Q. You made out the slips, didn't you?     A. Yes.

The COURT.—He testified the other day that everything was regular, as far as he was concerned.

**Testimony of Eva W. Benzion for Complainants (In Rebuttal).**

EVA W. BENZION, called by the complainants in rebuttal, testified as follows:

I was employed by the defendant during the month of September, 1913, in North Yakima, Washington, as manager of a sale he was conducting there. I deposited the daily sales and then when there was any amount I would draw checks and send them to Mr. Isaacs in Seattle. I don't know the exact amount; the sales were somewhere around \$7,000.00, and I sent him all with the exception of what the expenses were; his expenses were not very heavy up there.

Mrs. Isaacs is my sister and I am here under subpoena.

**Testimony of R. De Lappe, for Complainants (In Rebuttal).**

R. DE LAPPE, called by the complainants in rebuttal, testified as follows:

I was present in court this morning and heard the testimony of the defendant in regard to the interview he said he had with me at my office in this city. He never had any interview with me in connection with any matters relating to this case, either in my office or out of it. He never came to me in any way and offered to let me see his books of account or any data connected with this sale. [116]

We have employed Main on a great many cases. I have in my files letters to and from Mr. Main relating to this loss, including a statement made by



(Testimony of R. De Lappe.)

Mr. Isaacs to our company, made, I believe, late in the fall of 1913.

Mr. OLNEY.—These are all in evidence, Mr. Schlessinger.

Mr. SCHLESSINGER.—So I understand.

United States of America,

Northern District of California,—ss.

Now, at this time, the respective solicitors for the complainants and the defendant being present in court, on motion of the complainants and the Court being fully advised in the premises, hereby allows and settles the foregoing statement as and for the statement of evidence in the above-entitled suit on the appeal from the decree of this court to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby orders that the same be made a part of the record and filed in the above-entitled suit, and it is hereby further ordered and directed by the Court that the portions of testimony in the foregoing statement wherein the respective questions and answers of the several witnesses are therein reproduced in the exact words of said respective witnesses, be and the same are hereby directed by the Court to be allowed herein.

Dated this 27 day of November, 1917.

FRANK H. RUDKIN,

Judge of the United States District Court Sitting for the Northern District of California.

This statement may be approved.

LEON E. PRESCOTT,

Attorney for Defendant.



[Endorsed]: Filed Dec. 8, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [117]

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*In the United States District Court in and for the  
Southern Division of the Northern District of  
California, Second Division.*

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE COM-  
PANY, NATIONAL FIRE INSURANCE  
COMPANY OF HARTFORD, INSUR-  
ANCE COMPANY OF NORTH AMERICA,  
NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURG, Pa., SE-  
CURITY INSURANCE COMPANY OF  
NEW HAVEN,

Complainants,

vs.

DAVID ISAACS,

Defendant.

**Petition for Appeal.**

To the Honorable, the Judges of the District Court  
of the United States in and for the Southern  
Division of the Northern District of California,  
Second Division.

The above-named complainants, feeling themselves  
aggrieved by the decree made and entered herein on  
the 21st day of March, 1917, do hereby appeal from  
the said decree to the United States Circuit Court of  
Appeals for the Ninth Circuit for the reasons speci-  
fied in the Assignment of Errors which is filed here-

with, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal, be made.

Dated, August 24th, 1917.

JESSE OLNEY,

Solicitor and Counsel for Complainants. [118]

[Endorsed]: Filed Aug. 24, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [119]

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*In the United States District Court in and for the  
Southern Division of the Northern District of  
California, Second Division.*

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE COM-  
PANY, NATIONAL FIRE INSURANCE  
COMPANY OF HARTFORD, INSUR-  
ANCE COMPANY OF NORTH AMERICA,  
NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURG, Pa., SE-  
CURITY INSURANCE COMPANY OF  
NEW HAVEN,

Complainants,

vs.

DAVID ISAACS,

Defendant.

**Assignment of Errors.**

Now, on this twenty-first day of August, 1917, come the complainants above named by their solicitor Jesse Olney, and say that there is manifest error on the face of the record in the above-entitled suit and that the memorandum opinion filed herein on the 15th day of March, 1917, is erroneous, and that the decree made and entered in said suit on the 21st day of March, 1917, is erroneous, and unjust to the complainants, and the complainants hereby assign the same as error herein, for the following reasons:

**I.**

Because the District Court erred in its decision in refusing to accept the rule that the strictest interpretation of the law must be invoked against a trustee who has refused to account to his beneficiary and that the most rigid rule of calculation which the law affords should be followed in behalf of the *cestui que trust* as a substitute for such omission. [120]

**II.**

Because the District Court erred in its decision in holding and concluding every presumption throughout to be in favor of the trustee and against the *cestui que trust*, as every presumption should have been held and determined in favor of the latter, the trustee admittedly having derived a personal profit from the transaction.

**III.**

Because the District Court erred in holding and concluding that the burden was not upon the defend-

ant as the trustee of the complainants to render them a proper accounting.

#### IV.

Because the District Court erred in its decision in holding and concluding that concealment or unfairness do not necessarily entitle a principal to a judgment avoiding a sale by such agent to himself of the principal's property; and in so deciding the Court disregarded a fundamental rule of equity.

#### V.

Because the District Court erred in refusing to consider the great preponderance of evidence of a dozen witnesses not parties to the cause against the single self serving declarations of the trustee testifying for himself.

#### VI.

Because the District Court erred in its decision in not charging the trustee with the full value of the trust fund in his hands, he having entirely disposed of it and having commingled its proceeds with his own personal funds and merchandise and kept no separate account of either nor proper books of account.

The Coure erred in not requiring him as trustee to return to the [121] complainants the amount of this principal (\$45,974) as per the first inventory, Plffs. Exhibit "C," plus his profits thereon, with interest, less the amount he has already paid.

#### VII.

Because it was the duty of this defendant Isaacs as trustee for the complainants to have frankly informed his fiduciary of all the circumstances sur-



rounding his secret sale in bulk to himself of their merchandise; and his failure to perform that duty was active concealment and constituted fraud; and the District Court erred in its decision in not so holding and concluding.

#### VIII.

Because the District Court erred throughout the trial and in its decision in holding and concluding and refusing to consider evidence of actual fraud by the defendant and then in its opinion upon which the final decree dismissing the complaint was entered stating the complainants had not fully and clearly established such fraud.

The Court doubly erred for it was not necessary for the complainants to prove nor for the Court to find expressly that the acts done by this trustee were done with a fraudulent and wrongful intent; because his acts themselves as disclosed by the evidence were of such a character, considering the fiduciary relationship of the parties, that the law imputes fraud.

#### IX.

Because the District Court erred in its decision in holding and concluding that the defendant as a trustee commissioned to sell and being himself the purchaser through another (Seynei) secretly of the property of his principals, the complainants, could recover commissions from them on such sale in bulk to himself without their knowledge. [122]

#### X.

Because this defendant upon such sale in bulk having withheld \$2,218 from the complainants without their knowledge for secretly selling to himself



for \$8,875, net, merchandise valued at cost price \$31,153, and figured by himself in his own handwriting (Plffs.' Exhibit 16) at \$24,603.39, should have been held to return these commissions to the complainants upon this accounting; and the District Court erred in its decision in not so holding and concluding and charging this trustee upon this accounting.

### XI.

Because the evidence shows that Isaacs, this defendant, while trustee for the complainants, sold their merchandise secretly to himself for \$8,875 net. Within a few hours afterward he sold the same identical merchandise to his firm of H. C. Seynei & Co. for \$11,094. This personal profit of \$2,219 on their merchandise belonged to the complainants and not to Isaacs, their trustee, and the District Court erred in not so holding and concluding in its decision and charging this defendant therewith upon this accounting.

### XII.

Because the evidence showed the total net receipts from the entire second inventory of Bridge stock were \$15,468 more than Isaacs, their trustee, paid the complainants for it; and the District Court erred in not so holding and concluding in its decision and charging the defendant therewith upon this accounting.

### XIII.

Because the District Court in its decision in not considering the mute evidence of the defendant's own figures in his own handwriting (Plffs.' Exhbt.

16) as to the actual value of the [123] (\$24,603) of the merchandise in bulk, this trustee claimed to have sold fairly to himself for \$8,875 erred in not holding and concluding in its decision the said sale in bulk to himself clandestinely by this defendant to have been for an inadequate consideration, viz., one-third, as shown by the figures of the defendant in his own handwriting and by his admissions to Mr. Seynei regarding those figures; and the District Court erred in not setting aside the said sale in bulk as prayed for by the complainants.

#### XIV.

Because relative to this secret sale in bulk by Isaacs while trustee to himself, the District Court erred in holding and concluding that this defendant was empowered thus to sell the complainants' merchandise in bulk to himself without their full knowledge of all the facts as his principals; and that he could not be held accountable to the complainants for the personal benefits and profits he derived therefrom.

Because the District Court refused to consider the books of Isaacs firm of H. C. Seynei & Co. in evidence showing that whereas the defendant as trustee for the complainants sold the best of their merchandise on the fire sale for them at a loss of some 20% below their inventoried cost; he sold the remainder, after the secret sale in bulk to himself, the "fag end" for himself at a profit of 10% above their inventoried cost; both being based upon the original Bridge inventory cost as shown by the first inventory, Plffs.' Exhibit "C," stipulated to be correct by all parties.

## XV.

Because as this sale in bulk to himself by this trustee was attended by gross irregularity; and collusively conducted for the benefit of this trustee against the interest of the complainants, and the merchandise sold thereon to himself at a greatly inadequate consideration; the District Court erred in its decision in not so [124] holding and concluding and setting aside the said sale in bulk as prayed for by the complainants and charging the defendant upon this accounting with the full inventory cost price at least of the complainants' merchandise (\$31,153), or at least with the amount of his own depreciated inventory for his sale to himself in bulk (\$24,653).

Because the District Court erred further in not charging this trustee in addition upon this accounting with his profits on the complainants merchandise made by him thereon after his transfer in bulk to himself, as shown by the Seynei books in evidence. [125]

## XVI.

Because the District Court erred in its decision in refusing to consider and neglecting to refer to the summary in evidence (Plffs. Exhibit 19) of the chartered public accountants, Klink, Bean & Co., irrefutably showing the raw depreciation of the inventory taken by the defendant for the purposes of his own percentage bid for sale in bulk to himself of the Complainants' merchandise; a depreciation of the trust fund in his hands of \$6,500 for his own personal gain; and the fact that these figures of this exhibit are iron clad in their absolute corroboration

of the evidence of Mr. Seynei and Mr. Jeremy of the willful depreciation of the inventory by this trustee, and of his statements made upon its taking.

This one exhibit alone was sufficient to compel the District Court to give judgment for the complainants in a sum at least equal to the total of the depreciated inventory. It proves beyond question the raw depreciation of this second inventory by this trustee for his own advantage to the detriment of the complainants.

## XVII.

Because the District Court erred in its decision in holding and concluding and in its opinion saying:

“I do not understand the correctness of the second inventory was impuned aside from the claim that the cost price of some of the goods was marked down.”

The correctness of the second inventory was at all times “impuned” throughout the cause, by at least three witnesses, Mr. Seynei, Mr. Jeremy, and by the summary of the accountants Klink, Bean & Co., which proof not only showed the grossest frauds in its taking by this trustee in “marking down” the cost prices to the extent of some \$6,500 for his own individual gain; but in fact that some of the best of the complainants merchandise was not placed in it at all but taken up stairs into the balcony to avoid its being included; and that this merchandise, overcoats, shoes, etc., amounted to some \$5,000 in value, upon which no bid at all was made by Isaacs as his bid was only upon the inventory, in which this merchandise placed in the *balc* was not included. [126]



## XVIII.

Because the District Court upon this wrong hypothesis above and its conclusions of law thereon erred in holding and concluding in its decision that there was no clear or satisfactory proof by the complainants, and in stating in its opinion that there was some testimony tending to show that the cost price, as disclosed by the second inventory, was cut down materially for the purpose of reducing the amount of the bid but that the Court was not prepared to say that fact had been established.

(A) The evidence was clear, decisive and manifold.

(B) Klink, Bean & Co. in making their table of comparison between the first and second inventories (Plffs. Exhbt. 19) exposed conclusively the fact that after a three weeks sale *there were more articles of a similar kind at a given price in the second inventory* than in the first; for the stock remained the same without the addition of new goods. The evidence was—

For instance: In the first inventory there were 152 pairs of pants costing \$2.50 each. In the second inventory taken after a sale of three weeks, there were 354 pairs of pants costing \$2.50 each; in other words there were 202 more pants at \$2.50 on hand after the sale than there were at its beginning. This of course shows that prices were altered and must have been lowered, for an expert buying merchandise would *not raise* prices on *himself*; and in addition the high priced pants in the second inventory are mostly missing.



Another instance: In the first inventory there were 2 mackinaw coats costing \$3.25. In the second inventory at the end of this trustees' sale of the complainants' merchandise at the end of three weeks there were 21 mackinaw coats costing \$3.25; in other words there were nineteen more mackinaw coats at \$3.25 on hand after a sale of three weeks than at its beginning.

The first inventory shows that \$3.25 represented the *lowest* [127] *priced mackinaw coat* in the store; so that the price on the nineteen excess coats must have been "*marked down*" from the highest priced ones, *for there was nothing from which they could have been raised.*

(C) Plaintiffs' Exhibit 19 shows that these excesses occur continually throughout the departments, making over *two thousand* "*marking down*" of *prices.*

(D) The explicit evidence of Mr. Seynei upon the trial was that upon the taking of this second inventory the high priced goods were lumped into piles with the low priced goods, *and entered in lots in the inventory at the lower prices.*

(E) The evidence of Mr. Jeremy was equally explicit and to the same effect.

(F) The evidence of these two witnesses is irrefutably corroborated by the figures of the two inventories themselves as summarized by Klink, Bean & Co. in Plffs. Exhibit 19.

(G) The second inventory itself shows the merchandise was entered in lots and not taken piece by

piece thus conclusively corroborating Seynei & Jeremy.

(H) Isaacs this defendant did not contradict this evidence, nor is there any evidence of any nature to contradict Seynei or Jeremy or to explain in any way these *Two Thousand* discrepancies in the prices between the first and second inventories.

(I) A few days after the opening of the insurance retail sale of the merchandise of the complainants, their trustee formed a partnership for the express purpose of buying in the balance of the stock in bulk represented by this second inventory. It is beyond the fondest realms of the imagination to contemplate this defendant raising prices on himself; and the report shows prices could not have been *marked up*.

(J) The evidence and stipulations on the trial throughout was that first inventory was correct absolutely, included everything, and taken and checked by disinterested parties, therefore the changes in prices were [128] exclusively in the second inventory and constituted intentional "marking down" by this trustee for his own personal gain against the interest of the *cestui que trust*.

### XIX.

Because the District Court erred in its decision in holding and concluding that

"the utmost the complainants could claim would be to call upon the defendant to account for the amount of his bid, viz., 45% of the cost price."

(A) The evidence shows clearly the most outrageous fraud in the physical complexion of that bid

alone. The complainants introduced in evidence (Plffs. Exhbt. 21) a carbon copy of the actual bid prepared by the defendant and placed by him in the hands of his dummy (Seynei) who testifies he signed it and handed back to the defendant who had it in his possession at the time he sold the complainants merchandise clandestinely to himself in bulk. This bid was 47% of the depreciated second inventory. When the defendant found there was no *bona fide* competitive bids he dropped down this bid in his hands 2% from 47% to 45% thus cheating the complainants of \$492 on their own merchandise; for which sum, if there was nothing else in the cause they should have judgment.

(B) The evidence of the witnesses Seynei and Jeremy, conclusively corroborated by the figures of Klink, Bean & Co., the expert accountants, show an intentional depreciation of this second inventory by this trustee for his own benefit of \$6,500 (to say nothing of the \$5,000 of the best of the complainants merchandise stored in the balcony and not included in the second inventory); and his figures are therefore show false and untrue, irrespective of the actual fraud upon his fiduciary, these complainants, who are entitled to that sum in judgment, at least.

(C) However, the least that the complainants "could claim" would be the amount of the first inventory, \$45,974, less the amount [129] turned over by the defendant and the actual *bona fide* expenses.

(D) Or the amount of goods in the sale in bulk, \$31,153 plus his profits thereon as shown by the

Seynei books in evidence.

(E) These complainants certainly "could claim" themselves entitled to judgment for the commission, \$2,218, kept by this defendant on his sale of their merchandise secretly to himself in bulk.

(F) And these complainants certainly were entitled to judgment for the personal profit their trustee made *instantly* upon his sale in bulk to himself for \$8,875 and immediately transferring it to his partnership for \$11,094, and causing a credit to be placed on the Seynei books in his favor as having paid these companies that sum.

## XX.

Because the District Court in its decision erred in not disregarding entirely the testimony of George C. Main and in not considering the defendant Isaacs' own testimony that he set aside for Main \$4,000 of the stock of the Coast Fire & Marine Ins. Co. (under whose name the sale in bulk by Isaacs to himself was advertised) and in not therefor holding and concluding Main to be biased and a prejudicial witness and possibly pecuniarily interested in the transaction.

## XXI.

Because the District Court erred in its decision in holding and concluding that George C. Main, an independent insurance adjuster and not in the regular employ of the complainants, had authority to represent or bind them after his adjustment of the fire loss for them with the assured by their [130] purchase of the stock of merchandise from the assured for \$34,300 cash.



(A) Main himself claimed no further authority.

(B) All Main's correspondence with the complainants is in evidence and shows no further authority was conferred on him.

(C) Main testified when the stock went into Isaacs' hands he had nothing further to do with it.

(D) After that Main never examined the stock nor did Isaacs make any reports to him.

(E) Main himself considered his services at an end for he rendered his bill Sept. 8, 1913, and was paid and there is no record of any further charge; so that any further interest he took was entirely a moral as distinguished from a legal one and purely as a volunteer.

## XXII.

Because the District Court erred in its decision in holding and concluding that the authority of an adjuster lies in contract. In the State of Washington the authority of an adjuster is purely statutory there and defined by the codes. The complainants conferred no authority on Main except that conferred by the Washington statute which defines the authority of an adjuster within the state. There was no contract; no evidence of any contract. There is no evidence that the complainants knowingly permitted Main to exercise any authority after the stock passed into Isaacs hands; nor had they any knowledge of any of Main's acts after that; nor is there any evidence to show that Main communicated with them concerning the disposal of the stock either at retail or in bulk after Isaacs took control.



## XXIII.

Because the District Court erred in its decision in holding and concluding that further authority from the complainants to Main must be presumed after his adjustment of the Bridge fire loss for them, [131] through their purchase of the stock.

In the absence of direct proof no presumption of authority to Main to perform other duties and so bind the complainants can arise from the mere fact that he acted as an adjuster. No evidence was presented showing that any additional authority was conferred on this adjuster by the complainants which would have the effect of empowering him to waive any of the complainants' rights or bind or estop them in the present cause.

## XXIV.

Because the District Court erred in its decision in holding and concluding and saying in its opinion that the complainants were not represented at all if not by Main.

This is conclusively determined by the pleadings. The First Amended Bill of Complaint, Paragraph II, explicitly sets forth that the defendant did "actually take over into *his exclusive and sole possession and control* their said stock of merchandise." There is no denial by the answer nor is the allegation controverted anywhere. Isaacs' contract under the pleadings was with the complainants direct and Main had no authority whatever over the stock in the defendant's hands.

## XXV.

Because the District Court erred in its decision

in holding and concluding that the defendant rendered his statement to Main.

(A) Isaacs rendered a statement which was forwarded to the companies through Main.

(B) There is nothing in Isaacs' statement to show that he was the purchaser at bulk sale nor is there anything in the record to show Main acted otherwise than as a volunteer in forwarding it to the Companies for Isaacs.

## XXVI.

Because the District Court erred in its decision in holding [132] and concluding that Main was fully cognizant of all the facts relating to the sale in bulk by this defendant to himself as the complainants' trustee; for the following reasons:

(A) Main did not know that Isaacs closed the insurance retail sale for the *express purpose of buying in the balance of stock himself* in bulk.

(B) Main did not know that Isaacs formed a secret partnership four days after the opening of that insurance sale for that very purpose and had made arrangements for renewing the lease on the Bridge store.

(C) Main did not know the sale in bulk was a fake.

(D) Main did not know there were no *bona fide* bids.

(E) Main saw no bids.

(F) Main did not know the name of Harry Seynei was used as a blind.

(C) Main testified he was out of town when the merchandise was advertised for sale in bulk, and did

not know it was advertised on one day and that Isaacs made no proper effort to obtain competitive bids.

(H) Main did not know that Isaacs lowered his own bid from 47% to 45%, thus reducing the amount of his bid \$492 and thereby making a false total of \$11,094 instead of \$11,586.

(I) Main did not know that Isaacs made the second inventory of \$24,653 for the express purpose of a basis for his own percentage bid.

(J) Main did not know when Isaacs upon the sale in bulk, claimed the highest bid was 45% of the original Bridge cost prices that Isaacs had depreciated those cost prices thousands of dollars in that second inventory. *(Main repeatedly states he understood that second inventory was taken at Bridge cost prices the same as the first.)*

(K.) Main did not know that in the taking of that second inventory as a basis for Isaacs bid the high priced goods were lumped into bundles and mixed with the low and entered in that inventory at [133] prices far below the original Bridge cost prices on the sales tags; for he repeatedly states he understood the bid was 45% of the original Bridge inventory cost prices, and no depreciation allowed on account of any damage.

(L) Main testifies he did not examine the stock at the time of the sale in bulk by Isaacs to himself.

(M) Mr. Seynei testified that Isaacs intentionally concealed from Main the amount of goods left after the insurance sale and also that this defendant said he did not want Main to know how much stock

was left on the premises after that sale.

### XXVII.

Because the District Court erred even on the hypothesis of Main's agency in holding and concluding that he had full knowledge of all the matters set forth in the preceding assignment sufficient to bind and estop these complainants from a full recovery in the present cause.

### XXVIII.

Because the District Court erred in holding and concluding that an agent (if Main be taken to be one after the adjustment of the loss) could, by his silence, authorize, ratify or sanction an act he could not expressly authorize, sanction or approve; for the reason that Main, upon such hypothesis was an agent, a trustee of an express trust, and he could not permit or authorize Isaacs to do that with the trust estate which he could not do himself; and it was a perversion of the law for the District Court to so hold.

### XXIX.

Because the District Court in holding in its decision and concluding that this defendant could claim the benefit of any contractual relation in agency while committing a tort, erred and disregarded one of the fundamental principles of equity.  
[134]

The defendant is shown by the evidence in the commission of a tort (the lowering of his bid on sale in bulk to himself, his depreciation of the second inventory for the purposes of his percentage bid while trustee against the interest of the *cestui que trust*, his



instructions to his salesmen upon its taking, his forming his secret partnership to conceal from his fiduciary his connection with their property and ownership of it, his fake sale in bulk to himself, and his fake auction on the sale in bulk).

### XXX.

Because the District Court erred in its decision in holding and concluding

“the fact that the commission (on the sale in bulk by this trustee to himself) was claimed and held out was known to Main, and through him to the plaintiffs, and no complaint was made by them by reason thereof”;

for the reason that the evidence shows Main was not in the employ of the plaintiffs at the time. He had no authority from them and such cannot be presumed. They had no knowledge of the sale in bulk by their trustee to himself and that he had charged them with commissions on his own clandestine purchase. Main was not a general agent but merely an independent adjuster employed sometimes to adjust independent losses; and had rendered his bill and final report to the complainants on September 8th, 1913, and had been paid off in this matter. There is no evidence that plaintiffs had at any time knowledge of the sale in bulk. Isaacs concealed it from them in his statement and made no mention of it. [135]

### XXXI.

Because the District Court erred in its decision in holding and concluding



“The defendant commingled trust funds with his own, and failed to keep such accounts as should be demanded of every trustee, but this alone does not prove fraud or mistake,” and its inference thereon that there was no other proof and that his failure to keep proper books of account stood “alone” upon the record. Such, however, are not “alone” upon the record as the evidence shows this trustee the day he opened the insurance retail sale for the complainants going to an out of the way private banker and hiring a safe deposit box and visiting it an average of three times a week during the complainants’ sale although he had his own personal bank account in the Seattle National Bank and the use of a neighbor, M. Aaronson’s safe; his bringing his wife and daughter over one thousand miles from San Francisco to handle the complainants’ cash; his fraud in lowering the bid for his sale in bulk to himself from 47% to 45%; his fake auction for sale in bulk his fraudulent lowering of the cost prices in and depreciation of his second inventory for the purpose of his own percentage bid thereon; his refusal to give the complainants an accounting; his reliance upon the technical defenses of stated account, laches, and statute of limitations in an equity suit for an accounting brought by his *cestui que trust*; [136] his offering in evidence only \$2,850 of outside checks from North Yakima as deposited in the Seattle National Bank when his manager of his North Yakima business testified the checks from North Yakima were nearly \$7,000; his concealment of his bank-books and check-books and

stubs from his expert accountant Herrick; his offering copies of deposit slips from the Seattle National Bank amounting to only \$19,744.26 as deposited there while the Bank's auditor testified in reality he deposited \$20,577, during the insurance sale. His concealment of the cash register totals, the adding machine totals, and salesmans' indexes from the Court and his own witness Herrick, which were the chief proof if any of the accuracy of the selected sale slips offered in court in loose leafs and to show what and how many were missing; Herrick, his expert accountant, having admitted it was impossible for him to determine regarding them with the data which Isaacs furnished him for neither the cash-book entries nor sale slips were a complete record of the individual sales. Even his own self-serving figures showed his sale slips were short nearly 1500 articles of the actual number sold. His claiming he sold merchandise at retail for the complainants for 20% below inventory when the evidence of his own salesmen was that on that sale it was marked and sold 20% to 30% above its inventory cost; and this trustee introduced no evidence to contradict this other than his own self-serving declarations and figures. His taking receipts at his own sale from the clerks but not for the clerk hire at his sale as trustee for the complainants of their merchandise. [137]

## XXXII.

Because the District Court erred in its decision in holding and concluding this trustee's sale slips had not been impeached and that practically all the goods

had been accounted for and that the complainants had failed to show their trustee incorrect up to the time of the sale in bulk to himself.

(A) The burden was not upon the complainants, but upon their trustee to establish his good faith and the integrity of his figures and statements.

(B) His total amount of sales (\$17,800) as shown by his sale slips was 20% below the inventory cost prices of the merchandise; while the evidence of five of his own salesmen and of Mr. Bridge and Mr. Bailey showed that the merchandise on the insurance retail sale was marked and sold 20% to 30% above the same inventory cost prices.

(C) The evidence of Mason, Main, Seynei, and Jeremy was that such a stock at a fire sale should bring 20%, to 50% more than at an ordinary sale.

(D) Mason testified that this stock should have been sold at inventory prices; that the best would sell first and should bring way above inventory.

(E) The evidence of the Seynei books is that after the best of this Bridge merchandise had been sold at the insurance sale, the balance of the same stock at the sale for Isaacs' partnership of H. C. Seynei & Co., brought 10% above the same inventory cost.

(F) The evidence of Mr. Jeremy, Mr. Seynei, and Mr. Bailey, was to admissions by the defendant to them before the close of the insurance retail sale was that Isaacs before that sale closed told them and others that he had already "made good his guarantee (\$18,100), his commissions and all expenses, and was on velvet."

(G) The evidence of the Seattle National Bank by its auditor as a witness shows over \$4,000 more money deposited by this trustee during his sale at retail for the complainants than the amount purported by his selected sale slips offered in Court, less clerk hire, not to mention [138] sums in currency probably deposited in his private safe deposit box with Wm. D. Perkins & Co., private bankers.

(H) The evidence that the money for clerk hire was all paid out of the cash drawer, and was not included in the amounts deposited in bank.

(I) The evidence of Mr. Seynei was that during the rush of the first few days and whenever they were very busy, sale slips were not made out at all as there was no time.

(J) The evidence of the defendant himself shows that the entries in his so-called "cash-book," of sales, were made entirely in his own handwriting, although the balance of the book was kept by someone else. This trustee produced no evidence to corroborate these purported cash sales (although such evidence existed) except these loose leaf sale slips unverified by any check whatever.

(K) The evidence of the defendant's witness Herrick was that these slips were not a complete record of all the sales.

(L) The evidence shows the original cash register totals, the adding machine totals, and the salesmen's indexes by which alone these slips could be checked up, to be missing, and their absence and nonproduction unaccounted for by the defendant. His witness



Herrick testified that these indexes are the chief check on sale slips.

(M) The evidence was that all these existed at time of the insurance retail sale.

(N) The defendant failed to produce them.

(O) The evidence shows not all the goods sold even accounted for by the sale slips produced; and that this trustee did not instruct his two experts to check up the number of articles, but did this himself; yet his own self-serving declarations show the sale slips fell short nearly 1,500 articles. The evidence shows his declarations were inaccurate and contradictory and unsubstantiated by any other evidence than his own statements. [139]

### XXXIII.

Because the District Court erred upon the trial and in its decision in its acceptance over complainants' objections of the so-called "Report" (Defendant's Exhibit "B"), of the hired expert Herrick, admittedly made up from selected, self-serving data furnished him *ex parte* by the defendant before the trial and without reference or consideration of the evidence of the complainants as to the facts and based upon insufficient data, upon copies of papers without the absence or destruction of the originals being accounted for, and in the total absence and withholding of evidence such as adding machine totals, cash register totals, and salesmens' indexes, by which alone their accuracy could be established.

The Court's unquestioning acceptance and reception in evidence of this letter proof report which was a most glaringly imaginative composition as bearing



upon the accuracy of defendant's figures and even upon his probity and honesty, was absurd and gross error, and repudiation of all the fundamental principles of evidence for the following reasons:

(A) The witness Herrick himself stated it was not a complete record; that it was not based entirely upon original documents; that it was in part a conclusion, not a statement based on facts.

(B) Mr. Herrick stated it was an opinion based solely upon the data furnished him some weeks before the trial by the defendant; and that *it was only correct upon this basis upon which it was prepared.*

(C) Mr. Herrick said he did not know whether all the data was furnished him, that he had no way of determining whether all the sale slips were furnished him; some might have been missing; also the accuracy of the individual sale slips was doubtful.

[140]

(D) Mr. Herrick testified that no salesmens' indexes, cash register totals, or adding machine totals whereby these sale slips and cash entries could be checked up were furnished him by Isaacs, although they are always included in the usual record of each day's transactions. That indexes are the chief record of checking sale slips.

(E) That the book designated by Isaacs as a cash-book was not properly a cash-book; it was merely a book of record; it was simply a primitive, crude record of sales and disbursements, an abominable record.

(F) The entries in this "cash-book" were made in lead pencils and do not represent each individual

sale, but "purport" to be a record of the total aggregate sales made each day. There is in this "cash-book" no complete record of each individual sale and there is nothing appearing in the sale slips themselves showing them a complete record of all the sales.

(G) Herrick testified the entries in this "cash-book" were made in accordance only with the method that was used and only "appear to represent the total daily sales," and that it is only self-evident that the cash entries made up from the amount in the cash drawer at night do not include money not put in or taken out during the day.

(H) Herrick himself testified the actual accuracy of every individual slip is doubtful and that he only examined the amount totals of sales.

(I) Mr. Herrick was not requested by the defendant to check up the number of articles on the sale slips sold to see if they corresponded with the correct number of articles that were actually sold as designated by the difference in the two inventories.

(J) The vouchers were not originals, but all copies and do not verify the claimed items of expense.

(K) The bank deposit slips which this expert examined were not originals, but copies seemingly made by the defendant. These, [141] while rejected and not admitted in evidence by the Court, amounted to only \$19,744.26, and are only of value in showing that not the entire data was given this accountant by the defendant covering his deposits in the Seattle National Bank, for the testimony of the

auditor of the bank, E. K. Reilly, called by the complainants as a witness, shows that the defendant during the same period deposited \$20,577.

(L) This data of the deposit slips having been rejected by the Court, Herrick's "report," based in part upon rejected evidence, is worthless for any purpose.

(M) The total amount of North Yakima checks which was furnished by the defendant to Herrick some weeks before the trial for the purposes of his report was only \$2,850.

Mrs. Benzoin, Isaacs' own sister-in-law, who managed and conducted the business for him at North Yakima, testified upon the trial she forwarded to the defendant in Seattle nearly \$7,000 in checks.

Isaacs confesses he commingled these two accounts and had no other bank account.

(N) Mr. Herrick testifies Isaacs did not let him examine his original bank-book and check stubs.

(O) The excess in deposits in the Seattle National Bank as shown by the "report" of Issacs' expert, amounting to \$930, was accounted for by him by a mere conclusion that it embraced "some other money" than that coming from the insurance sale; this conclusion being supported by self-serving conversations *ex parte* with this defendant before the trial.

(P) Almost the entire "report" is an opinion or a conclusion of this accountant that the records "appear" and "purport" to be so and so, and "unless they are false" they do this and that. These complainants claim they are "false." At no time in

making up his conclusions does he speak of facts, but always of suppositions. [142]

That during the trial of said cause, the said Herrick, the author of said "Report," was called as a witness for the defendant; and the following proceedings were had relating to said "report" and the data before the trial furnished the witness by the defendant, and upon which said report was based:

Mr. SCHLESSINGER.—(Referring to said report.) We will ask that this be marked as our exhibit.

Mr. OLNEY.—Are you offering it?

Mr. SCHLESSINGER.—Yes.

Mr. OLNEY.—I object to it until we have the data upon which it was made. Conclusions of experts are not admissible in evidence until the foundation is laid for them by introducing the other papers and documents.

Mr. SCHLESSINGER.—Unquestionably, if that is not shown, it does not amount to anything. He testified to having made this from an examination of certain data. That data is in court.

The COURT.—Do you expect to identify that later?

Mr. SCHLESSINGER.—Certainly, the testimony has gone in somewhat out of order.

The COURT.—The objection, of course, is well taken, because the report is somewhat out of order, but if counsel desires to get through with the witness—

Mr. SCHLESSINGER.—I am simply wishing to expedite matters.



(Testimony of Lester Herrick.)

The COURT.—Of course, unless the report here is substantiated by the testimony offered later, the Court will not consider it. I will not rule on the objection at this time, but I will admit it; if it is not substantiated by the books I will reject it.

Mr. OLNEY.—I ask leave to ask the witness a few short questions.

Mr. SCHLESSINGER.—Oh, no; I shall object to that now, because I will substantiate it. If it is not substantiated it may go. [143]

Mr. OLNEY.—I want to ask the witness in regard to certain data that he has named. I am objecting to this report, and I desire to examine the witness regarding his data.

Mr. SCHLESSINGER.—I object to any cross-examination at this time.

The COURT.—Proceed with your examination of the witness, and if it is not substantiated I will strike the report. I will give you full opportunity for cross-examination. I will not rule on your objections at this time, but I will admit it; if it is not substantiated by the books it will be rejected.

Mr. SCHLESSINGER.—I will ask you whether or not in the course of your examination you examined a cash-book or what purported to be a cash-book, covering the sales of 19 days. A. Yes.

Q. Is that cash-book in court?

A. Yes, it is here.

Q. I will ask you whether or not you examined the entries in that cash-book? A. I did.

Q. State whether or not they appear to have been made in the due and regular course of business.



(Testimony of Lester Herrick.)

A. They did, *in accordance with the method that was used.*

Mr. SCHLESSINGER.—We will now offer in evidence this cash-book.

Mr. OLNEY.—We object to it on the ground the proper foundation has not been laid.

The COURT.—The same course will be pursued.

Mr. SCHLESSINGER.—I will ask you if in the course of your examination you examined certain sale slips?     A. Yes.

Q. I will ask you whether or not these are the slips you examined.

A. Yes, those I believe, to be all the tags we examined.

Mr. SCHLESSINGER.—We ask that these sales slips be admitted in evidence.

The COURT.—They will be admitted, assuming that they will be hereafter identified. It is merely a question of the order of proof.

Mr. OLNEY.—This is something that is going beyond the mere order of proof. He could bring in half of these slips; or he could bring in two-thirds of these slips. How is it to be determined what he has left out? [144]

The COURT.—Of course, if the report is not substantiated by testimony offered later it will go by the boards and amount to nothing.

Mr. SCHLESSINGER.—Now, if your Honor please, I will offer in evidence a cloth-covered book—I might do this, to shorten the offer, I might offer in

(Testimony of Lester Herrick.)

evidence all of the books and records appearing upon page 1 of Mr. Herrick's report.

The COURT.—They will be received for the purpose of identifying them as the books forming the basis of the report, but will not be admitted in evidence until they are further identified.

Mr. OLNEY.—That ruling, I presume, applies also to the sale slips.

The COURT.—That applies to everything referred to in the report.

Mr. SCHLESSINGER.—Q. Mr. Herrick, from your examination of these records and data submitted, are you satisfied that the statement rendered, that is, is it your opinion that the statement rendered by Mr. Isaacs to the insurance companies was correct.

A. My opinion is based entirely upon this evidence which was presented to me, and so far as I can form an opinion from an examination and a careful consideration of these papers this statement was correct.

Mr. SCHLESSINGER.—Now, your Honor, we will ask that these records, and data, documents and papers specified on page 1 of the report of Lester Herrick be admitted in evidence.

The COURT.—All these papers referred to by this witness will be marked in some way to identify them as the papers which he used in making up his report.

Mr. SCHLESSINGER.—I think your Honor has ruled that these may be admitted as one exhibit.

The COURT.—I am only admitting them conditionally. I am admitting them for the purpose of identification in connection with its report.

(Testimony of Lester Herrick.)

Cross-examination by Mr. OLNEY.

Q. Your report is made up from these sale slips and books exactly as you originally found them?

A. Yes. This examination, as appears upon the first page was investigation and partial conclusion upon all the things which were given us that appeared to have anything to do with [145] the preparation of a statement of this transaction; and they are all recited on the first page and are all here. They mainly consist of this cash-book or record-book and the sales slips and these vouchers.

Q. Your report has been made up from what has been furnished you?     A. Yes.

Q. You don't know what has not been furnished you?     A. No, I do not.

Q. You did not compare each separate sale slip?

A. There is nothing to compare it with.

Q. That is what I thought.

A. What could there be that they could be compared with, unless there was a complete record of the individual sales?

Q. There is no complete record, is there?

A. No, there is none.

Q. Did you also see the original adding machine totals of these slips?     A. No.

Q. Or cash register totals?

A. No, nothing except what I have referred to.

Q. Then you saw no other record than these slips and these books?     A. No.

Q. If any slips are missing, Mr. Herrick, they were not entered in the book, were they? You do not know how many slips were missing, do you?

(Testimony of Lester Herrick.)

A. No, I don't know whether any slips were missing or not.

Q. Mr. Herrick, if it should appear that upon this sale for which these sale slips have been produced here there were indexes made by each clerk showing the amount of each individual sales slip, and the total cash sales, which was turned in each night to this defendant, should not those indexes be produced here and accompany these sales slips in order to make a complete record?

A. Yes. These books contain, usually, 50 of these slips with carbons and there is also in the book a sheet having lines and numbered [146] spaces from 1 to 50, for the purpose of taking an entry of the total of each individual slip, and upon the conclusion of the day or the completion of the use of the slips, he figures his total and it becomes a record that enters into the entire record constituting an audit of the transactions of the day.

The COURT.—Totaled up by the salesmen?

A. It is totaled by the salesmen and returned first to the proper office and in an organized institution becomes a part of the organization records of the business of the institution.

Q. These sales slips in the book are removable?

A. Yes.

Q. This index in the book is returned at the close of the day to the cashier?

A. Yes, that is the proper practice.

Q. And that is the chief record to check, the sales record?



(Testimony of Lester Herrick.)

A. Yes, it is the means of carrying on the check of individual sales to the complete recapitulation.

Q. It also checks up the sales slips, does it not?

A. Yes.

Q. Your report, I believe, does not include these indexes?     A. No.

Q. There were none such furnished you?

A. No.

Q. I believe you also stated you did not have furnished to you any of the original adding machine totals or cash register totals of these sales by which they could be checked up.     A. No.

Q. Your only knowledge of the North Yakima deposits are the four cancelled checks of September 8, 9, 16, and 22, which have been produced here in Court.     A. And the checks themselves.

Q. Your only knowledge of these deposits are the four individual checks which have been produced here?     A. Yes.

Q. Have you examined Isaacs' Bank Book of the Seattle National Bank, and the stubs of his check-book covering the period of your report?

A. No, I have not.

Q. These were not produced to you and they are not among the data which you have offered?

A. No.

Q. Were you instructed to prepare totals of the quantities of the various [147] articles of merchandise sold at this sale in order to check the same up with the inventories?     A. I was not.

Q. Now, will you look at this record-book, Defendant's Exhibit "C." If this is a book made up from



the total cash in the drawer each night at the conclusion of business, then is it not also an incomplete record in that it might not show the sums of money taken out during the day, or not put in the drawer during the day?

The COURT.—I do not think it is necessary to ask an expert witness to deduce conclusions which are inevitable. If money was taken out of there the book, of course, does not show it.

During the course of the defendant's testimony in his own behalf later in the trial, the following occurred:

Mr. SCHLESSINGER.—We will offer in evidence the various slips, documents and data identified by Mr. Herrick yesterday afternoon and referred to specifically on page 1 of his report.

Mr. OLNEY.—We object to the admission of this insufficient data in evidence on the same grounds as offered to the partial offer of these other copies. These are not original records; every one of them are copies; the originals are unaccounted for. As far as this exhibit "C" is concerned, it appears that most of the book is in the handwriting of a bookkeeper, and kept by a bookkeeper who has not been produced upon the trial of this action.

The COURT.—Under the testimony, the book was kept under the immediate supervision of the defendant, he paid the money and the bookkeeper made the entries there, practically in his presence. I will overrule the objection to the book. I will admit the sale slips in evidence upon the identification made. The different receipts and vouchers the witness has testified that he paid I will also admit. The objec-

tion to the deposit slips will be sustained.

That the Court erred in admitting in evidence the sale slips unaccompanied by the usual checks of salesmens indexes, adding machine and cash register totals, and different copies of receipts and vouchers, and the so-called record-book, Defts. Exhibit "C," and in overruling the complainants' objections thereto. [148]

#### XXXIV.

Because the District Court in its decision and reception of evidence erred in accepting unquestioningly over complainants' objection this opinion of defendant's hired expert Herrick, as to the defendant's own honesty and integrity based upon self-serving data selected by the defendant *ex parte* weeks before the trial and placed in his witness' hands. Such opinion was not receivable in evidence unless based upon a thorough review of all the evidence in the case, and not upon *ex parte* statements of the defendant alone respecting his own honesty and integrity and to serve his own purse, regarding his dealings with the complainants. Such decision as to honesty and integrity was for the Court upon the entire evidence upon the trial to determine under the rules and decisions of equity. [149]

#### XXXV.

The District Court erred in holding and concluding in its decision and accepting the said book of record or "cash-book" so called, Defendant's Exhibit "C," as a proper book of account of the trust fund of *sufficient* in equity upon an accounting by

this trustee with his *cestui que trust* of his dealings with the trust fund.

The defendant's own witness Herrick testified, "The record is very abominable accounting—the records from the standpoint of criticism, are abominable." It was the duty of this trustee to have kept proper books of account of the trust fund in his hands and his failure to do so constituted a strong presumption against him. Under the law and decisions this exhibit was manifestly not a proper book of account, especially in the absence and nonproduction of the person making most of the entries.

#### XXXVI.

In the absence of proper books of account by this trustee of the trust fund in his hands the District Court erred in not charging him with the full value of the fund in a sum aggregating at least its inventoried cost value. In the absence of proper books of account the burden rested squarely upon the defendant.

#### XXXVII.

Because the District Court erred in its decision and upon the trial in accepting the copies of the various original claimed vouchers mentioned in Herrick's "report" without the destruction or absence of the originals being accounted for; and permitting the paid expert of the defendant upon these unverified copies, to give an opinion as to whether the defendant had made a satisfactory accounting. That was for the Court under the rules and decisions of equity to determine. [150]

## XXXVIII.

Because the District Court in its decision erred in holding and concluding that every item in this defendants expense account was satisfactory and fairly established.

(A) The only evidence was the production of unverified copies of receipts without the originals being accounted for, even these not checking Isaacs statements.

(B) The evidence shows this trustee produced no receipts from his employees for the item of clerk hire (\$1,655.21) although it shows Isaacs required Mr. Seynei, his partner, to take them for record on their partnership sale of the balance of this same merchandise.

(C) These partnership books are in evidence and show that at the same location, same rent, same light, labor, etc., with largely the same stock, this trustee's expenses when in business for himself were one-third less than when he did business for these complainants.

(D) Mr. Seynei, who managed the insurance retail sale for this trustee testified Isaacs figures of \$1,655.21 for clerk hire were excessive; that not over \$800 was paid out under that item on the insurance retail sale by this trustee.

## XXXIX.

Because the District Court erred in its decision in holding and concluding and inferring the value of the trust fund in the hands of this trustee was only about \$18,000 and that other parties concerned did not differ widely upon that question.



(A) Even this trustee admitted and the evidence shows he sold about one-third of it for \$17,800.  
[151]

(B) The Seynei books show that on the balance of the same stock this trustee realized about \$24,000, thus making some \$41,800, which must be accounted for and does not include Isaacs' secret sales.

(C) Bridge the owner testified his stock AFTER the fire was worth over \$50,000.

Seynei, the manager, and acquainted with the stock for many years testified the stock of merchandise *as* worth \$60,000 at retail.

Jeremy, the head salesman, testified the stock of merchandise was worth from \$60,000 to \$65,000 at retail.

(D) The adjusters Main and Mason and Mr. Jeremy testified that for the purposes of a retail fire sale such a stock of goods was worth from 20% to 50% more than at an ordinary sale; and that such is the case is really axiomatic with anyone acquainted with handling merchandise for fire sales. Also they testified an estimated loss is not a total loss. Goods can be reconditioned and sold at a profit.

There was no rebuttal by this trustee or contradiction in any wise of these statements except his own self serving figures and selected data in the absence of proper books of account.

(E) Mason also testified he personally would never have sold the stock to the companies for less than \$36,000 at a wholesale price; and that the merchandise should have sold at retail over and above



the inventory cost price.

(F) Main testified that Isaacs guarantee of \$18,100 was much less than the value of the salvage even from a wholesale standpoint. [152]

# XL.

Because the District Court erred in its decision in holding and concluding that \$34,300 was the actual sound value of the stock.

(A) The sound value agreed upon is shown by the evidence to have been a figure reached only in compromise and in no way represented the actual value of the merchandise. Both Main and Mason testified explicitly upon this point.

(B) The evidence shows Main wrote to the complainants at the time (Main's Report, Sept. 8, 1913, Plffs. Ex. "2-N"):

"Finding I could not agree with Mr. Mason I took the other tack of getting the sound value down as low as possible with the idea of eventually taking the stock."

(C) Main testified it was his idea to buy as low as possible at wholesale and resell at retail and thus net a considerable amount for the companies.

(D) The evidence shows \$34,300 was purely a purchasing price, not agreed to by Mr. Bridge, the owner, but objected to by him as being ridiculously small, but by his assignee for a creditor who was only interested in getting a quick settlement to cover the amount of its individual claim amounting to some \$15,000.

(E) The evidence shows Mason testified that both he and his experts considered the actual value considerably more.

(F) This amount was a bulk purchase and did not represent the value at retail sale. [153]

#### XLI.

Because the District Court erred in its decision in holding and concluding that the statement rendered by this trustee and set forth in the complaint, which was forwarded to the companies with his purported "net balance" of \$1,049 became an account stated between the complainants and himself as their trustee.

The District Court erred in its citation of cases and rule of law on this point to the effect that the burden of proof rested upon the complainants; the cases cited being where the fraud or error was apparent upon the face of the account. In the present cause Isaacs' statement to the complainants does not reveal his sale in bulk secretly to himself; nor his charge of commissions on such sale; and his fraud upon his beneficiary is not apparent from the closest scrutiny of the account.

#### XLII.

Because the District Court erred in its decision in holding and concluding that the complainants acquiesced for more than two years in their trustee's account without question or protest. The evidence shows his fiduciaries had no knowledge of the frauds of their trustee nor anything to put them on inquiry until the revelations in the Seynei suit against Isaacs in the federal court. Their action was then immediate.

#### XLIII.

Because the District Court erred in its decision

upon the wrong hypothesis of acquiescence in imputing laches to the complainants; and holding that laches short of the statute of limitations could be set up by an agent; the statute of limitations in actions for an accounting in California being four years; and the present action having been begun nineteen months before the statute expired. [154]

## XLIV.

That the said decision of the District Court is against law and against equity.

That the evidence is insufficient to justify the decision of the District Court herein.

That the District Court in its decision erred in holding and concluding that the Complainants' bill should be dismissed and in its order and decree dismissing their said Amended First Amended Bill of Complaint and in awarding costs to the defendant upon such dismissal.

WHEREFORE, the complainants pray that the said decree dismissing their bill be reversed, and that the Honorable, the United States District Court for the Southern Division of the Northern District of California, Second Division, be directed to enter such decree as is meet in the premises; or that the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit shall reverse said decree and render a proper decree on the record, and a judgment for their costs and disbursements herein together with their costs and disbursements in said lower Court.

JESSE OLNEY,  
Counsel and Solicitor for the Complainants.

[Endorsed]: Filed Aug. 24, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [155]

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*In the United States District Court in and for the  
Southern Division of the Northern District of  
California, Second Division.*

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE COM-  
PANY, NATIONAL FIRE INSURANCE  
COMPANY OF HARTFORD, INSUR-  
ANCE COMPANY OF NORTH AMER-  
ICA, NATIONAL UNION FIRE INSUR-  
ANCE COMPANY OF PITTSBURG, PA.,  
SECURITY INSURANCE COMPANY OF  
NEW HAVEN,

Complainants,

vs.

DAVID ISAACS,

Defendant.

**Order Allowing Appeal and Fixing Amount of Bond.**

This day came Jesse Olney, solicitor of record for the above-named complainants, and presented their petition for an appeal and assignment of errors accompanying the same, which petition, upon consideration of the Court, is hereby allowed, and the Court hereby allows an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of \$500.00, with good and sufficient surety, and it is hereby ordered that a certified transcript of the record, proceedings and



papers in the cause be certified to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 24th day of August, 1917.

WM. C. VAN FLEET,  
Judge of the United States District Court for the  
Southern Division of the Northern District of  
California.

[Endorsed]: Filed Aug. 24, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [156]

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31042-17.

UNITED STATES FIDELITY AND GUAR-  
ANTY COMPANY.

Capital Paid in Cash, \$2,000,000.

Total Resources Over \$6,000,000.

HOME OFFICE:

BALTIMORE, MD.

*In the United States District Court, in and for the  
Southern Division of the Northern District of  
California, Second Division.*

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE COM-  
PANY, NATIONAL FIRE INSURANCE  
COMPANY OF HARTFORD, INSUR-  
ANCE COMPANY OF NORTH AMER-  
ICA, NATIONAL UNION FIRE INSUR-  
ANCE COMPANY OF PITTSBURG, PA.,



SECURITY INSURANCE COMPANY OF  
NEW HAVEN,

Complainants,

vs.

DAVID ISAACS,

Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:

The undersigned United States Fidelity & Guaranty Company hereby acknowledges itself to be held and firmly bound unto David Isaacs in the full and just sum of Five Hundred Dollars, lawful money of the United States:

The condition of the foregoing obligation is such that

WHEREAS the above-named American Central Insurance Company, National Fire Insurance Company of Hartford, Insurance Company of North America, National Union Fire Insurance Company of Pittsburg, Pa., Security Insurance Company of New Haven, complainants, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree in the above-entitled cause, made and entered by the District Court of the United States for the Southern Division of the Northern District of California, Second Division;

NOW, THEREFORE, the condition of this obligation is such that if the above-named, American Central Insurance Company, National Fire Insurance Company of Hartford, Insurance Company of [157] North America, National Union Fire Insur-

ance Company of Pittsburg, Pa., Security Insurance Company of New Haven, Complainants, shall prosecute their appeal to effect and answer all costs, if they shall fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

Dated at San Francisco, this 24th day of August, A. D. 1917.

UNITED STATES FIDELITY & GUAR-  
ANTY COMPANY.

By WILL LOZE,

By W. S. ALEXANDER,

Attorneys in Fact.

[Corporate Seal]

[Endorsed]: Filed Aug. 24, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [158]

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(Title of Court and Cause.)

**Affidavit for Order for Transmission of Original  
Exhibits to Circuit Court of Appeals.**

United States of America,

State of California,

City and County of San Francisco,—ss.

Jesse Olney, being duly sworn, says: That he is and at times herein has been the solicitor for the complainants in this cause; and that there is by them an appeal pending herein to the U. S. Circuit Court of Appeals for the Ninth Circuit. That praecipes have been duly filed with the clerk of this Court as to documents, papers, etc., to be included in the transcript on said appeal; but that there are certain

original documents and papers which by reason of form and general character cannot be presented in the transcript and whereof actual inspection by the Circuit Court of Appeals in detail is a matter of vital necessity to the appellants in this cause for the proper understanding and consideration of their said appeal by said Appellate Court. That these documents consist of original books of account; original issues of newspapers some 10,000 loose leaf sales slips, etc., and are designated in said cause as Defendant's Exhibits "D" and "C"; and Complainants' Exhibits 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, and "C" and 16.

The complainants therefore ask that the proper order for transmission of the same to the U. S. Circuit Court of Appeals for the Ninth Circuit be made.

JESSE OLNEY.

Subscribed and sworn to before me this 8th day of October, 1917.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California. [159]

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(Title of Court and Cause.)

**Order for Transmission of Original Exhibits to  
Circuit Court of Appeals.**

GOOD CAUSE APPEARING THEREFOR by the affidavit dated and filed this day of Jesse Olney, Esqrs., solicitor for the complainant-appellants on the appeal pending herein to the Circuit Court of

Appeals of the United States for the Ninth Circuit, that actual inspection of certain original exhibits in this cause be had by said Court and which said actual inspection of said originals by reason of their form and general character is of vital necessity to the appellants in this cause and for the proper understanding and consideration of their appeal by the Circuit Court of Appeals, the same to be received and considered by it in connection with the transcript of the proceedings:

IT IS ORDERED: That the clerk of this Court do transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the originals of exhibits in this cause, making such arrangements as shall be necessary for their safety and return, as follows: Defendants' Exhibits "D," "C"; Complainants' Exhibits 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, "C," and 16.

Dated October 8th, 1917.

WM. C. VAN FLEET,  
Presiding Judge.

[Endorsed]: Filed Oct. 8, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [160]

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(Title of Court and Cause.)

**Order Enlarging Time to File Record and Docket  
Cause in Appellate Court Thirty Days from  
November 19, 1917.**

GOOD CAUSE APPEARING, it is hereby ordered that the Complainants' time for filing and



docketing the record in the above-entitled cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same hereby is extended THIRTY DAYS from the 19th day of November, 1917.

Dated November 14th, 1917.

FRANK H. RUDKIN,  
Judge.

[Endorsed]: Filed Nov. 16, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [161]

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**Plaintiff's Exhibit "A"—Letter, November 26, 1913,  
Isaacs to Main.**

Letter dated November 26, 1913, from D. Isaacs to George C. Main, as follows:

Dear Sir:

I enclose herewith statement of A. Bridge Company salvage, together with check for \$1049.81 to cover the net proceeds.

Trusting you will find same correct and satisfactory, I am.

Yours very respectfully,  
COAST FIRE & MARINE SALVAGE CO.,  
By D. ISAACS. [162]



**Plaintiff's Exhibit "B"—Statement of Account with  
Seattle National Bank.**

In Account With

**THE SEATTLE NATIONAL BANK**

Seattle, Washington.

Customers will confer a favor by reporting any  
difference promptly.

1913.	Checks.	1913.	Deposits.
Sept. 5	160.00	Sept. 5	1,000.00
12	12.45	6	636.99
15	5,000.00	8	2,310.00
16	200.00	8	629.38
18	3,000.00	8	898.90
19	283.90	9	255.96
20	4,000.00	9	924.30
23	25.64	10	1,503.10
24	4.75	10	373.00
24	10.00	11	406.42
25	2,000.00	12	710.93
27	2,000.00	12	263.15
30	142.80	13	280.00
30	2.50	15	2,263.23
30	250.00	16	374.00
30	50.00	16	1,016.42
		18	622.05
30 Bal.	3,602.22	19	377.35
		19	291.54
		22	377.75
		22	1,756.93
		23	918.10

*vs. David Isaacs.* 219

24	478.78
25	326.00
26	522.19
27	422.17
29	805.62
20,744.26	<u>20,744.26</u>

[163]

**Plaintiff's Exhibit 2—Letter to Mr. D. Isaacs.**

Mr. D. Isaacs,  
103 First Ave., South,  
Seattle, Washington.

Dear Sir:

I hereby submit to you the following bid of the  
A. Bridge stock: Forty-seven cents (\$.47) on the  
dollar of the invoice price.

Hoping this meets with your approval, I remain,  
Yours truly,

[Endorsed]: No. 253. U. S. Dist. Court, Nor. Dist.  
Calif. Plff. Exhibit 2. Filed Jan. 30, 1917. W. B.  
Maling, Clerk. [164]

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**Plaintiff's Exhibit 3—Advertisement, September 28,  
1913, in Seattle "Sunday Times."**

THE SEATTLE "SUNDAY TIMES," Sept. 28,  
1913.

The balance of the A. Bridge & Co., stock, 103-05  
First Ave. South, will be offered for bids Monday,  
September 29th, at 3 P. M.

220 *American Central Insurance Company et al.*  
**COAST FIRE & MARINE INSURANCE CO.,**  
**D. ISAACS,**  
**Manager.**

[Endorsed]: Plffs. Exhibit 3. Filed Jan. 30, 1917.  
W. B. Maling, Clerk. [165]

**Plaintiff's Exhibit 9—Inventory of H. C. Seynei &  
Co., November 17, 1913.**

INVENTORY OF

H. C. SEYNEI & COMPANY

Nov. 17, 1913.

Merchandise in Dept. #1.....	\$11,844.27
“ “ “ #2 .....	1,409.95
“ “ “ #3 .....	1,044.40
“ “ “ #4 .....	1,085.73
“ “ “ #5 .....	652.61
“ “ “ #6 .....	782.96
“ “ “ #7 .....	233.56
“ “ “ #8 .....	674.38
Total .....	\$17,727.86

Merchandise sold.

The Hub. Amt. \$373.84½	Disc. \$74.31	299.53
“ “		14.00
United States Rubber Co.		40.25
Norman Hotel		28.30
Black Mfg. Co. 107.40	26.85	80.55
Pearce Bros. 522.44	17.93	504.51
J. Aronson		79.90
Pearce Bros. Credit Memo. Bill		47.25
		\$1,094.29

Total..... \$16,633.57

[Endorsed]: No. 253. U. S. Dist. Court, Nor. Dist.  
Calif. Plff. Exhibit 9. Filed Jan. 30, 1917. W. B.  
Maling, Clerk. [166]

**Plaintiffs' Exhibit 10—Advertisement, October 17,  
1913, in Seattle "Daily Times."**

**THE SEATTLE "DAILY TIMES," FRIDAY  
EVENING, OCT. 17, 1913.**

**AGAIN I CUT.**

The low price at which I purchased from the fire insurance companies the big stock formerly owned by A. Bridge & Co. gave me a chance to offer most unusual bargains to the public. And the public certainly responded. I'm going to keep the crowds coming by slashing the prices still further.

\* \* \* \* \*

**HARRY SEYNEI.**

[Endorsed]: Plffs. Exhibit 10. Filed Jan. 30, 1917. W. B. Maling, Clerk. [167]

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**Plaintiff's Exhibit 12—Advertisement, October 31,  
1913, in the Seattle "Daily Times."**

**THE SEATTLE "DAILY TIMES," FRIDAY  
EVENING, OCT. 31, 1913.**

**I HAVEN'T HAD AN AD IN THE PAPERS FOR  
TWO WEEKS.**

Yet I've kept a force of clerks busy waiting on old customers, or people who were sent in by old customers. Treat the public right, give the utmost limit of value for every dollar received, back every sale with a **MONEY-BACK-IF-YOU'RE-NOT-SATISFIED GUARANTEE**, and the man or woman who comes to your store for a **SPECIAL BARGAIN**

becomes a regular customer. That's why I'm winning out.

\* \* \* \* \*

HARRY SEYNEI.

[Endorsed]: Plffs. Exhibit 12. Filed Jan. 30, 1917. W. B. Maling, Clerk. [168]

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**Plaintiff's Exhibit 13—Advertisement, October 3, 1913, in the Seattle "Daily Times."**

THE SEATTLE "DAILY TIMES," FRIDAY  
EVENING, OCT. 3, 1913.

I'M STARTING TO BUILD A BUSINESS.

And I'm lucky in the start. I've just bought from the Fire Insurance Cos. the big stock formerly owned by A. Bridge & Co. I got it at a ridiculously low price and I'm going to sell it to the public at prices just as ridiculously low. I'm going to clean every bit of it out in a hurry to make room for a fine big stock. When the big sale opens Saturday at 10 A. M. you'll see good clothing, Men's Furnishings and Shoes as nearly given away as this town has ever witnessed.

THESE PRICES WILL ADVERTISE MY  
BUSINESS.

\* \* \* \* \*

HARRY SEYNEI.

[Endorsed]: Plffs. Exhibit 13. Filed Jan. 30, 1917. W. B. Maling, Clerk. [169]



**Plaintiff's Exhibit 14—Advertisement, October 2, 1913, in the Seattle "Daily Times."**

**THE SEATTLE "DAILY TIMES," THURSDAY  
EVENING, OCT. 2, 1913.**

**OLD FIRM PASSES INTO HANDS OF YOUNG  
BUSINESS MAN.**

**Fire Insurance Companies, Which Took Over the  
A. Bridge & Co., Stock, Sell to Harry Seynei—  
Big Popular-Priced Clothing Store will be  
Established.**

Harry Seynei, one of the best known business men of the younger generation in Seattle, started plans last Tuesday which, if consummated, will place him at the head of one of the largest popular priced clothing stores on the Coast. By purchasing from the fire insurance companies the stock of A. Bridge & Co., 103-07 First Avenue South, he secured a big start for the exceptionally low price at which the stock was bought enables him to start his new store by offering great values to the public. The entire stock will be put on sale Saturday morning at 10 o'clock at prices that should start a stampede toward the corner of First and Yesler Way.

It is Mr. Seynei's ambition to make a steady customer of every purchaser at the first sale. To this end great cuts in prices have been made, full particulars of which will appear in to-morrow's papers.—  
ADV.

[Endorsed]: Plffs. Exhibit 14. Filed Jan. 30, 1917. W. B. Maling, Clerk. [170]

**Plaintiff's Exhibit 15—Advertisement, October 10, 1913, in the Seattle "Daily Times."**

**THE SEATTLE "DAILY TIMES," FRIDAY, EVENING, OCT. 10, 1913.**

**HOW CAN I DO IT?**

Many of my friends are wondering how I can sell a \$22.50 Suit for \$9.90. Well, you know, I got this stock way below cost. Bought from the fire insurance companies the great stock formerly owned by A. Bridge & Co. at a remarkably low price. I'm sacrificing it simply to advertise the place and get you into the habit of coming in.

**HARRY SEYNEI.**

[Endorsed]: Plffs. Exhibit 15. Filed Jan. 30, 1917. W. B. Maling, Clerk. [171]

**Plaintiff's Exhibit 16.**

**HOTEL HERALD**

**TERRY AVE. & MARION ST.**

**Seattle.**

Cashier. Bookkeeper

Ticket

Preston

Electric Lights

Schlackers

Clothes Dep.....1

Shoes.....2

Hats—Suit Cs.....3

Shirts.....4

Underwear.....5

Alaska Outfit.....6

Overalls.....7

Furnishing goods...8

Furnishing 1 Cs. Flan Linen S. D.

1 " Heavy Cotton Reb.

1 " Cashmere

1 " Cotton

1 " Heavy wool—Med.

Suspenders—2 grades

Hkfs.

Work Shirt—fill in on Flannel—Dress Shirt

Neckwear

Overalls—Jumpers

Work Gloves

Union Suits

Blankets

Hats

Umbrellas.

[Endorsed]: No. 253. U. S. Dist. Court, Nor.  
Dist. Calif. Plff. Exhibit 16. Filed Jan 30, 1917.  
W. B. Maling, Clerk. [172]

# HOTEL HERALD.

TERRY AVE. & MARION ST.

Seattle.

735 pr. Shoes.....	2166.80
123 " Rubber Boots—Shoes.....	289.65
Oilskins—Pants—Coats—Hats .....	110.95
Dust Coats—Overalls—Robes.....	
Mackinaw—Khaki .....	944.87
Underwear—Sweaters .....	
Dress Shirt—Gloves.....	3662.98
Hats—Caps—Hat Bands.....	1322.03
Vests—Aprons .....	50.50

226 *American Central Insurance Company et al.*

Trunk—Suit Cases.....	58.50
Collars—Cuffs .....	253.55
1108 Suits.....	8.50 11893.00
	850
157 Overcoats.....	1302.50
52 Cravenetts.....	374.00
4 Fur Coats.....	89.00
761 Pr. Pants.....	2043.90
	<hr/>
	24,603.39

[Endorsed]: No. 253. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 16. Filed Jan. 30, 1917.  
W. B Maling, Clerk.

**Plaintiff's Exhibit 18—Inventory A. Bridge & Co.  
Seattle.**

**A BRIDGE & COMPANY—SEATTLE.  
(D. ISAACS MATTER.)**

**INVENTORIES AT VARIOUS DATES COM-  
PARED.**

	Total.	Clothing, Suits and Overcoats.	Per Cent.
No. 1 August, 1913 (18th).....	45 954 00	24 135 40	52.52%
2 September, 1913 (28th).....	24 653 35	15 772 90	63.98%
3 November 29, 1913.....	16 633 57	11 844 27	71.21%
	Total.	Shoes.	Per Cent.
No. 1 August, 1913 (18th).....	45 954 00	5 176 40	11.27%
2 September, 1913 (28th).....	24 653 35	2 166 80	8.79%
3 November 29, 1913.....	16 633 57	1 409 95	8.48%
Sales between No. 1 and No. 2—Total.	21 300 65		
Sales between No. 1 and No. 2—Suits and Overcoats.....	8 362 50		
Per Cent of Suits and Overcoats Sold to Total Sold.....	39.26%		
Sales between No. 1 and No. 2—Total.	21 300 65		
Sales between No. 1 and No. 2—Shoes	3 009 60		
Per Cent of Shoes Sold to Total Sold.	14.13%		

# SUMMARY OF TRANSACTIONS FROM THE BOOKS OF H. C. SEYNEI & COMPANY IN THE HANDLING OF STOCK OF BRIDGE & COMPANY.

These are the sales and purchases between Inventory  
No. 2 and Inventory No. 3.

	Bridge Stock				
	Inventory.	Purchases.	Returns.	Sales.	
Department 1—Clothing .....	15 794 90	1 056 55	21 90	5 118 83	
Department 2—Shoes .....	2 183 30	613 63		1 690 42	
Department 3—Hats .....	1 310 24	298 20		562 01	
Department 4—Sweaters and Shirts .....	1 311 11	773 93	4 15	2 080 33	
Department 5—Underwear .....	2 012 50	1 059 98	5 00	2 012 06	
Department 6—Alaska Outfits .	1 105 55	951 98	188 50	1 364 44	
Department 7—Overalls .....	224 67	449 92		532 74	
Department 8—Furnishings ...	710 99	1 279 14		1 698 17	
	24 653 35	6 483 33	219 55	15 059 60	
Cash book entries (p. 23) not segregated .....				1 008 34	
				16 067 94	
EXPENSES: Advertising .....	58 90				
Advertising .....	517 61	576 51			
Salaries and Labor .....		1 264 60			
Rent .....		920 00			
Insurance .....		205 00			
Office Expense....		16 25			
Sundry Expense..		150 64			
		3 133 00			

Inventory No. 2 was taken in September, 1913, and  
Inventory No. 3 was taken in November, 1913.

The foregoing is a summary of the transactions  
compiled from the books of H. C. Seynei & Company.



A. BRIDGE AND COMPANY MERCHANDISE  
STOCK (ISAACS MATTER)

MEMORANDUM OF RESULTS OF SALES  
AND PURCHASES BETWEEN THE IN-  
VENTORIES No. 2 AND No. 3. (BOOKS  
OF H. C. SEYNEI AND COMPANY)

TOTAL SALES OF MERCHANDISE:

Sales subsequent to No. 2..	16 067 94
-----------------------------	-----------

Inventory No. 2 .....	24 653 35
-----------------------	-----------

Purchases Added .....	6 263 78
-----------------------	----------

---

	30 917 13
--	-----------

Inventory No. 3.....	16 633 57
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Balance — Cost of Goods

Sold .....	14 283 56
------------	-----------

Profit	1 784 38
--------	----------

CLOTHING:

Sales Subsequent to No. 2..	5 118 83
-----------------------------	----------

Inventory No. 2.....	15 794 90
----------------------	-----------

Purchases Added .....	1 034 65
-----------------------	----------

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	16 829 55
--	-----------

Inventory No. 3.....	11 844 27
----------------------	-----------

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Balance — Cost of Clothing

Sold .....	4 985 28
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Profit	133 55
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SHOES:

Sales Subsequent to No. 2..	1 690 42
Inventory No. 2 .....	2 166 80
Purchases Added .....	613 63
	<hr/>
	2 780 43
Inventory No. 3 .....	1 409 95
	<hr/>
Balance — Cost of Shoes	
Sold .....	1 370 48
Profit	319 94
Profit as above on all depart-	
ments .....	1 784 38
Profit on Clothing Sales ...	133 55
Profit on Shoe Sales .....	319 94
	<hr/>
	453 49
Profits on all other depart-	
ments	1 330 89

[Endorsed]: Plff. Exhibit 18. Filed Jan. 31, 1917.

W. B. Maling, Clerk. [175]

**Plaintiff's Exhibit No. 19—Comparison of Inventory  
No. 1 and Inventory No. 2 Showing the Classes  
and Process of Goods in Which the Second In-  
ventory Exceeded the First.**

A BRIDGE & COMPANY  
SEATTLE

Comparison of Inventory No. 1 and Inventory No. 2 Showing the Classes  
and Prices of Goods in Which the Second Inventory Exceeded the  
First.

Class	Valuing Rate	Inv. #1	Inv. #2	Excess of Quantity	Excess Total	Class	Valuing Rate	Inv. #1	Inv. #2	Excess of Quantity	Excess Total
Men's Suits	8 50	4	9	5		Hats and Caps	1 00	2	3	1	
	6 75	—	1	1			1 05	8	39	31	
	9 50	191	195	4			1 25	42	65	23	
	10 50	38	96	58			1 40		22	22	
	13 50	41	85	44			1 85	25	36	11	
	14 50	21	46	25			3 50	3	15	12	
	15 50	—	1	1		(Hats) Doz.	2 00		147	147	
	16 50	1	15	14		" "	3 50		36	36	
	17 00	4	6	2		" "	6 00		8	8	
	20 00	4	5	1	155	" "	7 50		28	28	
Men's Pants	1 00	16	45	29		" "	9 00		48	48	530
	2 50	152	354	202		Overcoats and					
	3 25	37	71	34		Cravenettes	4 75	3	15	12	
	3 65	—	35	35	300		5 25	—	2	2	
	75	—	2	2			5 75	—	17	17	
Shoes	2 25	19	34	15			6 50	26	44	18	
	2 50	21	87	66			9 00	40	41	1	
	2 60	15	28	13			9 50	2	21	19	
	3 40	21	34	13			10 00	3	4	1	
	4 10	2	5	3			10 50	8	23	15	
	5 00	20	43	23			13 00	5	7	2	
	5 25	—	3	3			15 75		2	2	80
	5 55		4	4	142	Boys' Suits	None in Excess in Inv. #2				
						Rubbers, Boots,					
						Sandals, etc.	55	9	11	2	
Hats and Caps	175		90	90			2 20	10	12	2	
	50		48	48			2 25	3	43	40	
	75		34	34							

	Valuing Rate	Inv. #1	Inv. #2	Excess of Quantity	Excess Total
Rubbers, Boots,					
Sandals, etc.	2 75			6	
	2 95		9	9	
	3 85		1	1	
	4 35		3	3	
	4 85		11	11	
	5 00		7	7	
	5 50		2	2	
	8 85		1	1	84
Mackinaws	3 25	1	21	10	
	4 10	16	20	4	24
Oil Coats	1 15	-	4	4	
	1 80	-	2	2	
	2 00	-	3	3	
	2 80	-	3	3	
	3 00	-	1	1	
	4 00	1	2	1	14
Sweaters	1 95		41	41	
	2 00	3	15	12	
	2 35	8	49	41	
	3 60	2	49	47	
	3 60	2	3	1	
	4 00	1	2	1	
	4 05	3	5	1	
	4 10	5	22	17	
	4 35	1	3	2	164

[Endorsed]: No. 253. U. S. Dist. Court.  
Nor. Dist. Calif. Plff.-Deft. Exhibit 19. Filed  
Jan. 31, 1917. W. B. Maling, Clerk. [176]

**Defendant's Exhibit No. 1—Recapitulation.****RECAPITULATION.**

Clothing table...	#1—	\$930.75	
	2—	1879.25	
	3—	1538.00	
	4—	1482.00	
	5—	1293.25	
<hr/>			
Total table 1 to 5, inclusive.....			7123.25
Clothing table...	#6—	918.90	
	7—	1084.25	
	8—	324.75	
	9—	1185.00	
	10—	1114.45	
	11—	356.00	
	12—	378.95	
<hr/>			
Total table 6 to 12, inclusive.....			5362.30
Clothing table...	#13—	238.75	
	14—	317.00	
	15—	108.75	
	16—	967.50	
	17—	1073.50	
	18—	1281.50	
	19—	1069.00	
	20—	1473.00	
	21—	754.00	
<hr/>			
Total 13 to 21, inclusive.....			7283.00



Suits, Overcoats & Uniforms on Counter & in Cabinet.....		1196.70
33 pr. Pants total loss.....	3.75	123.75
Overcoats & Suits on Balcony.....		2773.55
Shoes.....		4785.73
Rubber Shoes & Boots.....		567.30
Mds. in Annex other than Shoes & Rubber Goods.....		3621.40
Lot Shirts, Union Suits, Sweaters, etc. Total Loss.....		364.65
Wool shirts in shelves.....		1332.25
[177]		
Underwear near stair & table.....		730.36
Sweaters “ “ “ .....		
Furnishings in shelves.....		4829.90
Underwear & cases under counter..		76.92
18 5/12 doz. Shirts in show case....	11.50	211.79
12 4/12 “ “ “ “ “ ...	9.	111.00
Neckwear & Sox in case.....		114.00
Shirts & Sox in case.....		14.32
White Goods in Drawers, Barbers' & Waiters' Coats, vests etc.....		491.40
Hats & Caps.....		2144.48
Sweaters on Ledge n. side.....		465.40
Trunks & Suit Cases.....		110.10
Sweaters, Rugs and Underwear, balcony.....		1343.62
Goods in windows.....		777.23

[178]

**Defendant's Exhibit "2N"—Excerpt from Letter  
Dated September 8, 1913, Main to Company.**

A few days following the fire, after numerous conferences, Bridge made an assignment to P. B. Truax of the Seattle National Bank as Trustee for the creditors. Mr. J. R. Mason represented the assured and Mr. Truax in the adjustment of the loss, and put in a claim for loss amounting to \$18,254.84. My own figures amounted to \$13,588.65, which was the maximum amount that I was willing to pay for the damage and allow the assured to keep the stock. We went over the items and stock numerous times for several days and were unable to agree. I did not want to submit the matter to appraisers, fearing the result would be disastrous to us, and finding that I could not agree with Mr. Mason I took the other tack of getting the sound value down as low as possible, with the idea of eventually taking the stock. I therefore sent for Mr. Isaacs, who was in Portland at the time, and he came up here and spent several days and went over the stock with me. Meanwhile Mr. Mason reduced his claim to \$17,000, and this as a final proposition to \$16,200, which I would not accept, and he also claimed a sound value of \$38,675, which figure was also not accepted. As a consequence of Mr. Isaac's visit and his examination of the stock he concluded that he would be willing to advance as a guarantee the sum of \$18,100, bringing the loss down to the figures claimed by Mr. Mason, provided we could get the sound value down to \$34,300. After considerable more negotiation this was

agreed to by Mr. Mason, representing the assured, and the sound value was finally fixed at \$34,300 and the loss at \$16,200 in compromise, based on the guarantee of \$18,100 advanced by Mr. Isaacs and which has been turned over to the Trustee for the creditors. This was the best that could be done under the circumstances and the loss has been closed at the lowest figure acceptable [179] to the assured and the chance remains that we may secure considerable further returns from the sale of the stock over and beyond the guarantee advanced by Mr. Isaacs.

\* \* \* \* \*

I have spent a good deal of time on this adjustment, which accounts for the size of my bill, and believe it has been worth while. The stock has practically been in my charge for a number of days and all the details in connection with the care of same have been looked after by me until the arrival of Mr. Isaacs on Friday last.

\* \* \* \* \*

Receipted voucher in duplicate is enclosed covering my services and expense and trust all will be found satisfactory.

\* \* \* \* \*

[180]

**Defendant's Exhibit "2Q"—Statement—Salvage of  
A. Bridge & Co.**

**COAST FIRE & MARINE SALVAGE CO.**

**D. Isaacs, Mgr.**

**1261 Market Street,**

**San Francisco.**

**STATEMENT—SALVAGE OF A. BRIDGE & CO.**

**Clothing, Furnishings, Shoes.**

Net Sales—.....	28901.92
-----------------	----------

Expense:

Rent.....	920.00
-----------	--------

Light.....	66.88
------------	-------

Advertising.....	1204.21
------------------	---------

Clerk Hire.....	1655.21
-----------------	---------

Materials.....	90.84
----------------	-------

Insurance.....	34.59
----------------	-------

Commission for handling at 20%

on \$28901.92.....	5780.38
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Advanced as guarantee.....	18100.00
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<hr/>	
27852.11	27852.11

Net Proceeds.....	<hr/> 1049.81
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**Defendant's Exhibit "2T"—Letter, December 18,  
1913, Main to Company.**

GEORGE C. MAIN,  
Adjuster of Fire Losses,  
925 Leary Building,

Main 7835.                      Seattle.                      Dec. 18, 1913.

To Companies Interested.

Gentlemen:—

**LOSS SEATTLE A. BRIDGE & CO.—FIRE AUG.  
11, 1913.**

I beg to enclose herewith copy of report on sale of salvage rendered by the Coast Fire & Marine Salvage Co. of San Francisco, from which will be seen that the total net recovery is \$1049.81.

You will also find enclosed check covering your proportion, the total insurance on stock being \$21,000.

I am pleased that we are able to report a substantial salvage, although not quite as much as I had hoped for, but this is easily explained owing to the adverse conditions which confronted Mr. Isaacs in disposing of the stock. However, the amount recovered is net gain over what we were able to close the loss with the assured through their adjuster, Mr. Mason, and on the whole satisfactory.

Kindly acknowledge receipt in due course, and oblige

Yours very truly,

GEO. C. MAIN,

Adjuster [182]

GCM/M



**Defendant's Exhibit "B"—Statement January 30,  
1917, Lester Herrick and Herrick to Schlesinger.**

#2196-88

**LESTER HERRICK AND HERRICK,**

Certified Public Accountants,

Merchants Exchange Building.

San Francisco, Cal., January 30, 1917.

Bert Schlesinger, Esq.,

San Francisco, California.

Dear Sir:

At your request we have made an investigation of the transaction appearing as having been carried on by Mr. D. Isaacs in connection with the salvage of Messrs. A. Bridge & Co. at Seattle, Washington, during the month of September, 1913, growing out of the arrangements apparently made between Mr. D. Isaacs and the various insurance companies which were concerned in the matter by reason of a fire loss.

In this connection we have received for purpose of this examination the following stated books and records:

A cloth covered book apparently used for the purpose of a record of this particular business, which is marked by us with the letter "A" in the upper corner of the front cover for purpose of identification.

Vouchers supporting certain disbursements numbered by us from one to ten inclusive.

Four typewritten sheets designated "Labor Account Bridge Sale," and numbered by us from one to four inclusive.

Statement of the account between Mr. D. Isaacs and the Seattle National Bank extending from September 5th to November 24, 1913, showing total deposits and withdrawals of \$36,908.95.

Twenty-seven deposit tags of the Seattle National Bank purporting to be copies of the original deposit tags covering the bank deposits by Mr. D. Isaacs as to the period from September 5th to September 29, 1913.

Four bank checks drawn by Mr. D. Isaacs upon The First National Bank of North Yakima, Washington, apparently embraced within the deposits made by Mr. D. Isaacs in the Seattle National Bank.

Typewritten statement purporting to be the account of Mr. D. Isaacs of the sales in this matter, aggregating a total of \$28,901.92. [183]

Check of Mr. D. Isaacs upon the Wells, Fargo Nevada National Bank in favor of Geo. C. Main, Adj. in the sum of \$1,049.81.

Copy of first Amended Complaint in the case of American Central Insurance Co. et als., Plaintiffs, vs. David Isaacs, Defendant, showing on Page 4 the statement of this transaction as rendered by Mr. D. Isaacs.

Sales tags presented as all of the sales tags covering retail sales in this matter during the period from September 6, 1913, to September 27, 1913.

The principal purpose of this investigation has been the acquirement of information and a determination from the evidence presented concerning

the accuracy and integrity of the sales and expenses as reported by Mr. D. Isaacs and upon which report the settlement was made between Mr. D. Isaacs and the insurance companies concerned.

Upon the conclusion of this investigation we now present the following statements:

STATEMENT A—Statement of Receipts and Disbursements as per Memo. Cash-Book.

STATEMENT B—Recapitulation of Sales, Separately Stated as Appear by the Cash Memorandum Record and as Determined by us upon the Basis of the Sales Tags Presented for Examination.

STATEMENT C—Statement of Total Transaction Based upon Information Received.

STATEMENT D—Re Deposits in the Seattle National Bank.

STATEMENT E—Re Evidenced Net Receipts Available for Deposit.

We will now proceed with a consideration of these statements:

**STATEMENT A:**

This statement exhibits total net sales of \$17,807.92, direct disbursement of expense of \$3,973.60 with resultant net receipts of \$13,834.32.

As to the cash sales of \$17,779.60 reference is directed to the showing by Statement B. This total of \$17,807.92 is correctly set forth upon Page 68 of

the Memorandum Cash Book upon the basis of the accuracy and integrity of the entries of daily sales there [184] showing. All of the disbursements appear by the record of disbursements showing on Pages 68 and 72 of the said book. As to the disbursements supported by vouchers, the vouchers presented appear to represent actual and proper payments. As to the disbursement for labor, this total disbursement of \$1,654.71 is in agreement with the cash disbursement record aforesaid and as per the typewritten sheets purporting to exhibit the various employee's time of service and individual payments. These payments are stated to have been made in coin coming from the coin received from the sales and no vouchers are presented. As to the petty expenses aggregating \$93.19, this is the correct total of a large number of petty purchases and expenses appearing in the aforesaid record and apparently of a natural and proper character.

#### STATEMENT B:

This statement exhibits a comparison between the daily totals of sales appearing by the record of the aforesaid book and as produced by us from a machine recapitulation of the tags presented and purporting to be all of the tags of the actual sales. A comparison of the totals evidenced an overage in the record total entering into the statement of settlement over the said total as obtained by us from the examination of the original tags of \$8.01. In this connection it must be understood that some of these tags are poorly written or with a poor carbon impression and there can be no actual certainty as to



the actual exact total thereof. In our opinion and upon the assumption that all tags have been presented to us, we have reached the opinion that the record of these sales is at least intently and approximately correct.

#### STATEMENT C:

This statement presents in concrete form the settlement between Mr. D. Isaacs and the insurance companies upon the basis of the information afforded by the various papers and records which have been hereinbefore referred to. Upon the basis of the accuracy [185] of the statement of the net receipts from the retail sales, showing by Statement A, in the sum of \$13,834.32, the bulk sale of the balance of stock amounting to \$11,094.00, and the commission of Mr. D. Isaacs amounting to \$5,780.38, there has been an apparent over-payment by Mr. D. Isaacs resulting from the stated payments of \$18,100.00 and \$1,049.81, amounting to \$1.87. This \$1.87 represents the excess of the total disbursements amounting to 3,973.60 appearing by Statement A, over the total of the segregated expenses showing by the statement exhibited in the aforesaid Amended Complaint in the total amount of \$3,971.73.

#### STATEMENT D:

This statement exhibits the total deposits in the account of Mr. D. Isaacs in the Seattle National Bank during the period from September 6th to September 29, 1913, in the total sum of \$19,744.26, from which we have deducted the sum of \$2,850.00 aggregating the total of four checks upon the First National Bank of North Yakima, Wash., and referred



to hereinbefore, with a resultant balance in the sum of \$16,894.26, which amount of deposit is evidently concerned with the deposits made by Mr. D. Isaacs from the realizations from the sale concerned in this matter.

#### STATEMENT E:

This statement is partially based upon information afforded to us by Mr. D. Isaacs as to those expenses which were paid by bank check inasmuch as the checks themselves have not been presented to us. The statement exhibits the net receipts from sales as per statement of \$17,759.42. Of the total expenses appearing by Statement A in the sum of \$3,973.60, we are informed by Mr. Isaacs, and the information appears reasonable, that certain expenses, aggregating \$2,192.90, were made by means of bank checks. With this consideration there results a payment in cash in the total sum of \$1,780.70 out of the receipts mainly in payment of the labor charge, leaving a balance of evidenced net receipts in the sum of \$15,978.72 which naturally in the course of the transaction would [186] have been deposited in the account with the Seattle National Bank that was established in connection with this transaction. Statement D exhibits a net deposit during the time from this or some other unknown source of \$16,894.26, which exceeds the amount of the net receipts available for deposit showing by this Statement in the sum of \$15,978.72 in the sum of \$915.54. In Statement D we include a deposit on September 29th of \$805.62. The deposit on September 27th was \$422.17, while the sales of Sep-

tember 27th, or the last day, amounted to \$1,055.50. It evidently was not the practice to wholly deposit the daily receipts as received and we do not know the real composition of this deposit of \$805.62, but it is manifest that at least a part thereof covered the funds remaining on hand after the conclusion of the sale on September 27th. We are informed by Mr. Isaacs that he considered this account to be entirely under his own personal control and that the insurance companies concerned were only concerned with a correct accounting and settlement and not with the maintainence of this particular bank account. As appears by the statement of the Seattle National Bank there was a deposit in this account of \$1,000.00 with which the account was opened on September 5th and Mr. Isaacs informs us that this deposit was to provide for expenses prior to the receipt of funds from the sale. Mr. Isaacs informs us that without specific recollection it is probable that deposits were made by him within these stated total deposits in the period of moneys received by him from other sources. The information afforded by this Statement E is not definite or conclusive but it is indicated that the total excess of the deposits over the funds available for deposit from the sale in the sum of \$915.54 is subject to a reasonable explanation and in any event is not of a relatively large amount.

We are, Dear Sir,

Faithfully yours,

LESTER, HERRICK & HERRICK,

Certified Public Accountants. [187]

# STATEMENT A.

## STATEMENT OF RECEIPTS AND DISBURSEMENTS AS PER MEMO. CASH BOOK.

RECEIPTS: \$17,807.92

Cash Sales,		
D. Isaacs, Personal	As per Statement B. . . .	17,779.60
	" " C. B. Fol. 68. . . .	48.50
		<hr/>
Less Refunds	" " " " " "	17,828.10
		20.18
		<hr/>

DISBURSEMENTS: 3,973.60

Supported by Vouchers	" " " " " "	& 72	2,225.70
The Gatzert Schwabacher Land Co.			
	Rent Veh. #1		920.00
Times Printing Co.	Advt.	2	507.15*
The Post-Intelligencer			
Co.	"	3	308.05
The Star Publishing Co.	"	4	208.03
J. C. Corey Sign Co.	"	5	80.00
Sun Publishing Co.	"	6	71.00
Puget Sound Traction			
L. & P. Co.	Lights	7	66.88**
Swedish Press	Advt.	8	30.00
Cotton Burckhardt			
Company	Ins.	9	28.09
Milwaukee Mechanics			
Ins. Co.	"	10	6.50***
			<hr/>

Labor as per Memo. Pay Rolls	1,654.71
10 Items "J" Folio 68	707.26
10 " " " 72	947.45
	<hr/>

Petty Expenses	93.19
20 Items "M" Folio 68	31.45
10 " " " 72	61.74
	<hr/>

NET RECEIPTS \$13,834.32

\* Voucher Shows \$512.35.

\*\* Not Receipted.

\*\*\* Voucher Shows \$ 27.50.

STATEMENT B.  
RECAPITULATION OF SALES.

		As per Cash Memo. C. B. Fol. 68.	As per Sales Tags.
September	6, 1913,	\$3,717.25	3,707.95
"	8, "	1,612.77	1,591.22
"	9, "	929.40	946.11
"	10, "	820.65	819.73
"	11, "	725.80	736.27
"	12, "	563.02	570.27
"	13, "	1,636.09	1,626.36
"	15, "	637.60	642.94
"	16, "	556.65	601.11
"	17, "	445.25	427.13
"	18, "	369.00	363.90
"	19, "	404.35	430.88
"	20, "	1,619.95	1,591.26
"	22, "	776.10	746.82
"	23, "	510.60	536.83
"	24, "	392.46	389.84
"	25, "	496.36	507.20
"	26, "	510.80	497.59
"	27, "	1,055.50	1,038.18
Total		\$17,779.60	17,771.59

STATEMENT C.

STATEMENT OF TOTAL TRANSACTION  
BASED UPON INFORMATION RE-  
CEIVED.

Net Receipts, Sept. 6-27, as per Statement A.....	\$13,834.32
Balance of Stock, Sold to H. C. Seynei & Co. Sept. 30, as per Memo. Received...	11,094.00
	<hr/>
Total Net Proceeds.....	24,928.32
Less Commission to D. Isaacs, as per Memo. Re- ceived .....	5,780.38
Sales, Sept. 6-27.....	17,807.92
H. C. Seynei & Co.....	11,094.00
	<hr/>
20% of	28,901.92
	<hr/>
Net Proceeds.....	19,147.94
D. Isaacs Advance, as per Memo. Received..	18,100.00
D. Isaacs Settlement, Nov. 26, 1913, as per Memo. Received.....	1,049.81
	19,149.81
	<hr/>
Apparent Overpayment.....	\$1.87



STATEMENT D.  
RE DEPOSITS IN THE SEATTLE NATIONAL  
BANK.

September 6, 1913,	\$ 636.99
“ 8, “	3,838.28
“ 9, “	1,180.26
“ 10, “	1,876.10
“ 11, “	406.42
“ 12, “	974.08
“ 13, “	280.00
“ 15, “	2,263.23
“ 16, “	1,390.42
“ 18, “	622.05
“ 19, “	668.89
“ 22, “	2,134.68
“ 23, “	918.10
“ 24, “	478.78
“ 25, “	326.00
“ 26, “	522.19
“ 27, “	422.17
“ 29, “	805.62
<hr/>	
Total	19,744.26

Less Checks on the Na- tional Bank of North Ya- kima, Wash., favor D. Isaacs, apparently in- cluded in the above de- posits .....	2,850.00
Check #10, September 8, 1913.....	1,000.00
Check #13, September 9, 1913.....	850.00
Check #14, September 16, 1913.....	500.00
Check #16, September 22, 1913 .....	500.00
<hr/>	
Deposits from A. Bridge & Co. Sales, but possibly also including personal deposits of D. Isaacs.....	\$16,894.26

[191]

# STATEMENT E. RE EVIDENCED NET RECEIPTS AVAIL- ABLE FOR DEPOSIT.

Cash Sales, As per Statement A.....		\$17,759.42
Total Sales .....	17,779.60	
Less Refunds .....	20.18	
Less Expenses, Apparently paid out of Cash Drawer		1,780.70
Total Expenses, as per Statement A..	3,973.60	
Less Expenses stated as paid by Check	2,192.90	
Folio 68, Timbes Printing .....	12.45	
72, Advertising .....	283.90	
Telephone .....	4.75	
Cash Registers.....	10.00	
Advertising .....	308.05	
Times Publishing Co.....	142.80	
Swedish Press .....	30.00	
Sun Pub. Ad. ....	11.00	
Post-Intelligencer Add. ....	12.45	
J. C. Cory Sign Co.....	80.00	
Star Pub. Co.....	208.03	
Gas Elec. ....	66.88	
Rent .....	920.00	
Times Ad. ....	68.00	
Insurance .....	28.09	
Insurance .....	6.50	
Evidenced Net Receipts Available for Deposit		<u>\$15,978.72</u>
Deposits from A. Bridge & Co., Sales, but possibly also including personal de- posits of D. Isaacs, as per State- ment A .....		\$16,894.26
Evidenced Net Receipts Available for Deposit .....		<u>15,978.72</u>
Discrepancy.....		<u>\$915.54</u>

This discrepancy can be accounted for either by personal deposits by D. Isaacs, or if any of the other expenses were paid by Check or if a Cash Check was drawn at any time and the money put in the *Chas. Drawer* and subsequently deposited.

[Endorsed]: Defts. Exhibit "B." Filed Jan. 31, 1917. W. B. Maling, Clerk. [192]

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**Praeipie for Transcript of Record.**

(Title of Court and Cause.)

To Walter B. Maling, Esqr., Clerk of the Above-entitled Court:

You will please transmit the following certified transcript of the record, papers and proceedings in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

1. First Amended Bill of Complaint as amended by the amendment of January 31st, 1917, omitting portion of said amendment struck out by order of Court and consent of counsel:

2. Answer to First Amended Bill of Complaint;

3. Petition for Order allowing, and Bond on, Appeal; Decree;

4. Assignment of Errors; Citation on Appeal; Opinion;

5. Statement of Evidence;

6. Exhibits—as follows—in order named:

Complainants' Exhibits 2, 16, 19, 18, "D" (first page), 9, and following extracts from Complainants' Exhibit "2n," being excerpts from Report of Geo.

C. Main to Complainants dated September 8th, 1913: Last paragraph, page 1, commencing "A few days following fire" and ending on second page with words "advanced by Mr. Isaacs;" the third paragraph thereafter following on page 2, commencing "I have spent" and ending "Friday last." Last paragraph page 2 commencing "Receipted" and ending with "Satisfactory."

Defendant's Exhibits 1, "E-1," "B" (first four pages).

You will also transmit to said Court the originals of exhibits without incorporating such exhibits in the transcript, as follows;

Defendant's Exhibits "D," "C;"

Complainants' Exhibits 4, 5, 6, 7, C, 8, 1, 3, 10, 11, 12, 13, 14, 15, 17. [193]

The proper order of such transfer will be obtained.

Dated September 7, 1917.

JESSE OLNEY,

Solicitor for Complainants.

Copy received on Sept. 7, 1917.

BERT SCHLESINGER,

One of the Attys. for Deft.

LEON E. PRESCOTT,

One of the Attys for Deft.

[Endorsed]: Filed Sep. 7, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [194]



(Title of Court and Cause.)

**Additional Praecipe for Transcript of Record.**

To Walter B. Maling, Esq., Clerk of the Above-entitled Court:

You will please transmit the following additional record to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

Complainants' Exhibit 10—First nine lines followed by name Harry Seynei;

Complainants' Exhibit 3—Advertisement only.

Complainants' Exhibit 15—Insert only; followed by name Harry Seynei.

Complainants' Exhibit 12—First 13 lines followed by name Harry Seynei.

Complainants' Exhibit 14—Advertisement entire.

Complainants' Exhibit 13—First 8 lines followed by name Harry Seynei.

You will please designate each by the name of the newspaper and date of issue; and will please from each omit the picture.

JESSE OLNEY,  
Solicitor for Complainants.

[Endorsed]: Filed Sep. 21, 1917. Walter B. Maling, Clerk. [195]

*In the Southern Division of the District Court of the  
United States, in and for the Northern District  
of California, Second Division.*

No. 253—IN EQUITY.

AMERICAN CENTRAL INSURANCE CO. et al.,  
Plaintiffs,

vs.

DAVID ISAACS,

Defendant.

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, to hereby certify the foregoing one hundred ninety-five (195) pages, numbered from 1 to 195, inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipes for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$91.10; that said amount was paid by Jesse Olney, Esq., attorney for plaintiffs; and that the original citation issued herein is hereunto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court

this 2nd day of January, A. D. 1918.

[Seal]

WALTER B. MALING,  
Clerk United States District Court, for the Northern  
District of California. [196]

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**Citation on Appeal.**

UNITED STATES OF AMERICA.—ss.

The President of the United States, to David Isaacs,  
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein American Central Insurance Co., National Fire Insurance Co. of Hartford, Insurance Company of North America, National Union Fire Insurance Co. of Pittsburg, Pa., Security Insurance Company of New Haven, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 27th day of August, A. D. 1917.

WM. C. VAN FLEET,  
United States District Judge. [197]

[Endorsed]: No. 253—Equity. United States District Court for the Northern District of California. American Central Ins. Co. et al., Appellants, vs. David Isaacs, Appellee. Citation on Appeal. Filed Aug. 28, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

United States of America,

Southern Division of the Northern District of California,—ss.

Receipt of the within Citation on Appeal as required by law is hereby acknowledged at San Francisco, California, this 28th day of August, 1917, subject to all objections and exceptions.

BERT SCHLESINGER,  
Solicitor for Appellee.

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[Endorsed]: No. 3105. United States Circuit Court of Appeals for the Ninth Circuit. American Central Insurance Company, National Fire Insurance Company of Hartford, Insurance Company of North America, National Union Fire Insurance Company of Pittsburg, Pa., Security Insurance Company of New Haven, Appellants, vs. David Isaacs, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed January 2, 1918.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



*In the United States District Court in and for the  
Southern Division of the Northern District of  
California, Second Division.*

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE CO. et al.,  
Complainants,

vs.

DAVID ISAACS,

Defendant.

**Order Enlarging Time to File Record and Docket  
Cause in Appellate Court Sixty Days from Septem-  
ber 20, 1917.**

GOOD CAUSE APPEARING, it is hereby or-  
dered that the Complainants' time for filing and  
docketing the record in the above-entitled cause in  
the United States Circuit Court of Appeals, Ninth  
Circuit, be and the same hereby is extended sixty  
days from the 20th day of September, 1917.

Dated September 13th, 1917.

WM. C. VAN FLEET,

Judge.

[Endorsed]: No. 253—In Equity. United States  
District Court, Southern Division, Northern Dis-  
trict of California, Second Division. American  
Central Insurance Co. et als., Complainants, vs.  
David Isaacs, Defendant. Order Enlarging Time  
to File and Docket Record. Filed Sep. 13, 1917.  
F. D. Monckton, Clerk.



*In the United States District Court in and for the  
Southern Division of the Northern District of  
California, Second Division.*

IN EQUITY—No. 253.

AMERICAN CENTRAL INSURANCE CO. et al.,  
Complainants,

vs.

DAVID ISAACS,

Defendant.

**Order Enlarging Time to File Record and Docket  
Cause in Appellate Court to and Including  
December 19, 1917.**

GOOD CAUSE APPEARING, it is hereby ordered that the complainants' time for filing and docketing the record in the above-entitled cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby extended to the 19th day of December, 1917, inclusive.

November 19, 1917.

WM. W. MORROW,

Judge of the U. S. Circuit Court of Appeals, Ninth  
Circuit.

[Endorsed]: In Equity. No. 253. United States District Court, Southern Division, Northern District of California, Second Division. American Central Insurance Co. et als., Complainants, vs. David Isaacs, Defendant. Order Enlarging Time to File and Docket Record. Filed Nov. 26, 1917. F. D. Monckton, Clerk.

*United States Circuit Court of Appeals for the Ninth  
Circuit.*

AMERICAN CENTRAL INSURANCE CO. et al.,  
Appellants,

vs.

DAVID ISAACS,

Appellee.

**Order Enlarging Time to File Record and Docket  
Cause in Appellate Court to and Including  
January 4, 1918.**

Good cause being shown, it is hereby ordered that the appellants in the above-entitled case may have to and including the 4th day of January, 1918, within which to file the record and to docket the case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 19, 1917.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and including January 4, 1918, to File Record thereof and to Docket Case. Filed Dec. 19, 1917. F. D. Monckton, Clerk.

No. 3105. United States Circuit Court of Appeals for the Ninth Circuit. American Central Insurance Co. et al. vs. David Isaacs. Order Under Rule 16 Enlarging Time to January 4, 1918, to File Record thereof and to Docket Case. Refiled Jan. 2, 1918. F. D. Monckton, Clerk.





